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VOLITIONALISM AND RELIGIOUS LIBERTY

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INTRODUCTION

Volitionalism pervades American thinking about law, politics, religion, and morality. Overwhelmingly, Americans believe that individuals should suffer consequences only for actions that they individually and freely choose to undertake and could choose not to undertake. It is unfair to hold an individual responsible for her actions or the actions of others if she could not control those actions. For many Americans, volitionalism has almost attained the status of

an orthodoxy. This volitionalist point of view is not inevitable; many people at many times have believed that events in the world over which the individual has no control might justly affect her fate. God may afflict Job or Fate condemn Oedipus despite their best mortal efforts. To many, such nonvolitionalist attitudes seem vaguely un-American, vestiges of a darker world view that oppressively refused to recoguize the right of the individual to direct her own destiny.

But, ideological orthodoxy of any kind also seems vaguely un-American and regressive; Americans pride themselves on their commitment to the right of each to her own opinion. This aversion to conformist pressure has always been especially manifest in religion, hence the much-proclaimed American commitment to religious pluralism. Hostility to orthodoxy is especially acute when the state attempts to impose the orthodoxy, hence the oft-stated American commitment to state neutrality on fundamental matters of belief. For many, then, state treatment of nonvolitionalist religions poses a conflict of principles: on the one hand, nonvolitionalism seems unacceptably cruel or backward, a fit object of suppression; on the other hand, discrimination against nonvolitionalism seems to violate our commitment to neutrality toward all religions.

This Article discusses the implications of the conflict between volitionalist and nonvolitionalist beliefs for the protection that should be extended to religious liberty, especially under the free exercise clause of the Constitution.[1] Under one view of the Constitution, individual liberty presupposes volitionalism. Any belief system that maintains that individuals justly suffer for events outside their control hardly exhibits an adequate regard for individual freedom. Under this view, the Constitution thus protects individual rights, including the rights of religious practice, precisely and only because it incorporates a volitionalist frame of reference. Individuals should have a sphere of autonomy in certain areas because their most fundamental moral, religious, or political action is making up their own free and self-determining minds. In short, the enshrinement of religious liberty is nothing more than a recognition of the importance of volitionalist activity.

In exercising her right of religious liberty, however, the individual might reach conclusions at odds with volitionalism. Some of these conclusions might seem ridiculous: A believer might conclude that the color of the government's filing cabinets or the temperature on a given day affect her chances of entering Heaven. Others might seem more plausible: The adherent might believe that God decides

[1] The clause provides: "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. CONST. amend. I.

who enters Heaven without regard to individual actions. Under a volitionalist theory of liberty, these beliefs are palpably false. At this point, however, the second principle, the opposition to all state-imposed religious orthodoxies, becomes relevant. An interpretation of the Constitution emphasizing a broad commitment to religious liberty for, and governmental neutrality toward, all religions requires the government to protect the nonvolitionalists' rights as vigorously as it protects the rights of volitionalists.

Thus, because of the pervasive and largely unexamined belief that volitionalism and liberty are intrinsically tied, one would anticipate courts and legislatures displaying a bias in favor of volitionalist religions. But at the same time, a commitment to religious liberty and religious neutrality should require those bodies to examine that unexamined assumption, to extend evenhanded treatment to both volitionalist and nonvolitionalist religious beliefs.

The thesis of this Article is twofold. First, we will offer the recent history of free exercise clause jurisprudence as evidence that American legal commentators too often assume that religious liberty makes sense only within a volitionalist framework. Confronted in recent years with nonvolitionalist claims, the Court first held that nonvolitionalist beliefs enjoy second-class status under the free exercise clause;[2] then last Term, it radically restricted the protection available to all religious practice, volitionalist or nonvolitionalist.[3] We will argue that this retreat is due, in part, to the Court's profound discomfort with nonvolitionalist beliefs. Second, we will argue that the association of volitionalism and religious liberty is unwarranted. The tradition, theories, and policies underlying American religious liberty support protection for nonvolitionalist beliefs as fully as for volitionalist ones. Courts and legislators should protect each alike.

Part I of this Article will advance the first claim: Volitionalism has almost attained the status of an unexamined orthodoxy. Section One will offer definitions of volitionalism and nonvolitionalism; provide illustrations of these concepts in law, philosophy, and religion; explore the pervasiveness of volitionalism in modern America; and place the two concepts in a general intellectual context.

Sections Two through Four will analyze recent Supreme Court cases against the backdrop of this widespread belief in volitionalism. During the past several Terms, the Court has faced a new challenge from nonvolitionalist claims under the free exercise clause. It has

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2 *See* Lyng v. Northwest Cemetery Protective Ass'n, 485 U.S. 439 (1988); Bowen v. Roy, 476 U.S. 693 (1986); *infra* text accompanying notes 206-48.

3 *See* Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595 (1990); *infra* text accompanying notes 257-76.

responded by constricting and finally eliminating the protection accorded to religious practice from generally applicable laws. The Court accomplished this doctrinal revolution through a redefinition of the type of government action that qualifies as a "burden" on religious exercise.

"Burden" is a magic word in free exercise clause jurisprudence. A government action that burdens religious practice is constitutionally invalid unless the action is the least restrictive means by which the government may serve a compelling state interest.[4] If the government action does not "burden" religious practice, the free exercise clause does not apply.[5] The parameters of the class of constitutionally cognizable burdens, therefore, largely define the reach of the free exercise clause.[6] Until recently, free exercise doctrine seemed to offer a fairly straightforward, if very broad, definition of burden. If a government action pressured a believer, even by a neutral secular law, to forgo a religious practice, the government burdened religious practice.[7] The protection extended religious practice was very generous. Conceivably, almost any government act could pressure some believer into forgoing some practice and thereby be subject to challenge. It was only a matter of time before the Court restricted the reach of the clause.

The Court did not attempt to restrict the clause, however, until it ruled on its first nonvolitionalist claims; it then began a retreat that has since become a rout. In the best publicized of these claims, Indian believers sought to prevent federal government development of Indian sacred sites located on federal land. The Indians had no hand in the development: they did not own the land; they did not drive the tractors. Despite their inability to prevent the development of the land, however, they still believed that it would have tremendous negative consequences for them. In response, the Court effectively held that the Constitution did not recognize those negative consequences because the document itself adopted a volitionalist perspective. More specifically, the Court held that what it called

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4 *See, e.g., Smith*, 110 S. Ct. at 1602; Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141 (1987).

5 *See, e.g., Lyng*, 485 U.S. at 450. For a discussion of the "gatekeeper" function of the concept of burden, see Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 933-36 (1989).

6 The definition of "burden" does not perform this function alone; other lines of doctrine, such as the constitutional definition of religion, also contribute to defining the reach of the clause. Still, since the Court has not directly assayed a constitutional definition of religion, the definition of "burden" has been to this point the most important element in determining the reach of the clause. On the definition of religion, see *infra* notes 499-529 and accompanying text.

7 *See* Sherbert v. Verner, 374 U.S. 398, 403-06 (1963); *infra* text accompanying notes 108-21.

"internal" governmental practices posed no constitutionally cognizable burden on a religious practice.[8] In so holding, the Court effectively defined internal practices as those that are internal only from the point of view of a volitionalist. Implicitly, the Court decided that the commitment to volitionalism must take precedence over the commitment to neutrality between religions.

Last Term, the Court seems to have held that the Constitution does not protect any religious practice, volitionalist or nonvolitionalist, from generally applicable laws.[9] This decision involved a volitionalist claim: a member of the Native American Church complained that anti-drug laws frustrated his sacramental consumption of peyote. The Court held that facially neutral laws never constitutionally burden the practice of religion, regardless of whether the government practice is "internal" or "external." Thus, the Court superficially eliminated the discriminatory aspect from its jurisprudence. Significantly, the Court was prepared to be generous in its protection as long as the claimants under the old regime were volitionalists. When the Court confronted the possibility that its prior jurisprudence would require protecting nonvolitionalist claims, however, it began to restrict the protection extended by the clause. At both stages of this retreat—when it first restricted protection to volitionalist claimants and then when it reduced the protection available even to them—the Court relied centrally on a "parade-of-horribles" argnment brought to their attention by the prospect of nonvolitionalist religions claiming protection under the Constitution.[10]

Perhaps more significantly, the Court has now made clear that protection for religious practice from neutral laws is largely a matter of legislative grace. Legislatures may, but need not, give hardship exemptions to believers. In light of the volitionalist orthodoxy, it seems likely that legislatures will be inclined to grant exemptions for volitionalists but not for nonvolitionalists. Indeed, those legislatures may not even understand the nature of the damage done to nonvolitionalist religions. Part II, therefore, argues that nonvolitionalist religions deserve as much protection as volitionalist ones, under either the Constitution or a statutory scheme. In making this argument we rely on the conventional materials of constitutional analysis—the history, policies, and principles underlying the free exercise clause. Nevertheless, these policies and principles should guide legislatures no less than the Court. If a legislature decides to

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8 *See Lyng*, 485 U.S. at 448-49; Bowen v. Roy, 476 U.S. 693, 699-700 (1986).

9 *See* Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595, 1599-1600 (1990).

10 *See infra* text accompanying notes 246, 283-84.

extend special protection, a concern for neutrality and liberty should require it to grant that protection to volitionalist and nonvolitionalist beliefs alike. If a legislature fails to extend such evenhanded treatment, however, the Court should step in to correct such discrimination. Under the Court's new regime, the Constitution may no longer require special protection for religious practice. Nonetheless, if a legislature decides to offer protection to some, it should offer it to all. Nonvolitionalism is not a poor cousin within the constitutional family of American religions.

To support this claim, Sections Five and Six will refer to standard materials of constitutional interpretation. Section Five offers an analysis of the history of the first amendment and the intent of its framers. Although Madison and Jefferson offered a typically volitionalist defense of religious liberty, they, as well as their Calvinist supporters, intended to extend protection to predestinarian Calvinists, a distinctly nonvolitionalist group. Section Six argues that the precedent and policies identified by the Court as underlying the free exercise clause—government neutrality toward religion and voluntarism—require extending protection to nonvolitionalist claims.

Section Seven will consider the practical problems that a legislature might face under a requirement that it treat volitionalist and nonvolitionalist claims alike. Such a requirement would limit the legislature's options. It cannot extend special protection to some if it is not willing to extend the protection to all. Moreover, as a general rule, protecting nonvolitionalist religions may require greater disruption of governmental activity because any action—landing a man on the moon, the color of the government's file cabinets, initiating a war in Central America—might have an impact on a nonvolitionalist believer's religious practice. But, extant doctrine does recoguize the government's interest in such extreme cases. The government may treat various religions differently if it has a compelling interest in doing so. This doctrinal option requires the government to categorize a religious practice on the basis of the disruption that would be visited upon its own activities, but not on the basis of its underlying belief system. The latter means of categorization would pose a theological orthodoxy under the free exercise clause; the former would merely recoguize the government's own legitimate interests as they conflict with the rights of the believer. Protecting some nonvolitionalist claims may create overwhelming disruption to the government. Thus, the state may have a compelling interest to exclude them from protection while including other volitionalist practices. On the other hand, protecting other nonvoli-

tionalist claims may pose a relatively minor inconvenience, no more than protecting many volitionalist practices.

Given the enormous variety of religions and the subtle ways that casual assumptions about them color the thinking of policymakers, achieving even a rough neutrality is a daunting task for government. This task is one that many decisionmakers may not even want to undertake. The phenomenon here described, bias in legal circles against nonvolitionalist religions, is part of a much larger problem. Americans tend, despite their own best impulses, to believe that a limited religious pluralism is adequate if it includes the bulk of the population. The inclination to exclude nonvolitionalist religions from the protection accorded others is thus continuous with the inclination, for example, to require Catholic children to listen to Protestant teachers read the King James Bible in public schools—and to see no real issue of religious liberty involved in those events. But the volitionalist bias may be even more endemic than other prejudices against religious minorities, because it is simultaneously more unobtrusive and more fundamental. That individuals should control their own destinies seems to many utterly self-evident—the very warp of American legal and popular culture. But that assumption is not and never has been self-evident to all of humanity. To shear off all nonvolitionalist thinking from the fabric of American life would be drastically to restrict the thoughts that Americans can think. To illuminate this danger, we begin by placing the distinction between volitionalism and nonvolitionalism in intellectual context.

PART I:
THE ADOPTION OF A VOLITIONALIST THRESHOLD REQUIREMENT

SECTION ONE.
VOLITIONALISM EXAMINED

Volitionalism is a word that calls to mind a focus on will, and therefore on choice. But choice can take many forms and carry various types of significance. If volitionalism is to have any explanatory power, it must be defined more precisely and placed in the intellectual context out of which it grows and to which it contributes. This section will describe in detail the nature of volitionalist and nonvolitionalist beliefs and the difference between them. It will also examine the legal and philosophical foundations of the volitionalist/nonvolitionalist distinction.

A. The Distinction

The distinction between volitionalist and nonvolitionalist beliefs lies in the role of individual free choice in the causal sequence that leads to the religious, moral, or legal consequence. Volitionalists believe that religious consequences flow only from the freely chosen behavior of human beings and that the religious consequences fall exclusively on the particular individual who chooses. Nonvolitionalists acknowledge the possibility that some religious consequences for individuals may be caused by activities or events over which they had no free choice or control.

According to the common volitionalist view, morality and religion, like law, are defined by a set of rules or guidelines for behavior and belief.[11] People are liable to suffer legal, moral, or religious consequences only for their own free choices to fulfill or not to fulfill obligations that are laid down by some legal, moral, or religious authority. In other words, the central moral or religious activity, the activity that generates moral or religious consequences for the person, is his own free choice to behave or believe in ways specified by moral or religious rules.[12]

Note that the central volitional activity therefore has two elements: It must be a choice, and the choice must be in some important sense free. Although the two elements are analytically distinct, the distinction may not be readily apparent because choice is a word whose colloquial meaning has come to include an inherent notion of freedom. An "unfree choice" may seem to modern eyes to be an oxymoron. Many people may believe that only free acts are chosen and only chosen acts are free.

This conjunction of choice and freedom is, however, an illustration of how volitionalism pervades our culture. In a volitionalist view, unfree choices and nonchoices are functionally identical be-

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11 There is great controversy over the definition of religion, and many religious thinkers have believed that this simple moralistic picture of religion is inadequate. *See* FRANCIS OAKLEY, THE WESTERN CHURCH IN THE LATER MIDDLE AGES 94-100 (1979) (discussing the "interior" piety of the medieval mystics); ELAINE PAGELS, THE GNOSTIC GOSPELS 143-49 (1979) (discussing the Gnostic emphasis on knowledge rather than morality). We do not assert that this is an accurate or adequate conception of religion, for either theological or legal purposes. We merely point out that it is a very common conception of religion and one with strong ties to the volitionalist focus on individual choice which we are exploring. *See infra* text accompanying notes 305-11 (for discussion of historical connection between volitionalism and this picture of religion).

12 In order to avoid caricaturing volitionalism, it is important to note that a volitionalist position does not require an unsopbisticated acceptance of the appearance of undetermined human choice. Volitionalists may believe that much of human activity is determined by forces beyond the individual's control and that it is difficult for others to judge when an individual is freely choosing and when he is determined. But the volitionalist must believe that free choice is possible at least some of the time if moral responsibility is to exist at all.

cause neither can give rise to moral or religious consequences. The volitionalist, therefore, elides unfree choices into nonchoices. However, there is nothing inevitable about this identification of the two concepts. We will distinguish them in order to leave room for the nonvolitionalist possibility that unfree choices can cause religious consequences.

We offer the following definitions to allow us to talk intelligibly about both volitionalist and nonvolitionalist concepts of choice. At its most minimal, the term "choice" might imply only that the action is the product of the actor's own will—free or not free, coerced or not, with a broad or narrow range of options open to it. Unchosen acts, which are the product of physical force imposed on the actor's body, cannot give rise to volitionalist liability. Volitionalist liability depends on a notion of causality. If the individual is not the cause of the act, she cannot be liable for its religious or moral consequences. Choice is, therefore, essential to volitionalist liability.

The term "free," however, specifies a subset of choices that are both uncoerced and undetermined. If a choice is free, the actor could have chosen otherwise; she had a power to the contrary.[13] Both coercion and determinism may undermine that power.[14] Liability for a volitionalist depends upon responsibility under a set of rules. If the agent had no power to the contrary, then there is no sense in which she could have been guided by the rules. Thus, for a volitionalist, religious consequences can flow only from an individual's own free choices.

Nonvolitionalists, on the other hand, hold that a person may suffer religious consequences because of some act or event over which she had no free choice or control. The relevant act may either be someone else's action, even the *government's* action, or the act may have been committed by the individual but not freely chosen by her. If either choice or freedom is not a precondition for religious liability, then the position is nonvolitionalist.

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13 Not that she could have *done* otherwise, only that she could have *chosen* otherwise. It may be that, had she attempted a different act, she would have found herself physically incapable of carrying it out. Nonetheless, if she could have chosen to attempt it and did not, then her choice was free.

14 Determinism may achieve this through the straightforward method of denying that persons ever can choose otherwise than as they do. Coercion is more complicated. Take the classic example of someone holding a gun to the head of the actor and demanding money. The actor can choose not to hand over the money: she can refuse and be shot. She retains a technical power to choose, unlike in the case of complete causal determinism. Coercion is, therefore, not a complete excuse in a volitionalist system because free choice still exists. *Cf. infra* text accompanying notes 167-76 (discussing coercion as an excuse in the context of the free exercise clause). Nonetheless, extreme coercion of this kind may reduce an actor's options to the point where the analogy to determinism is quite strong. It is this analogy that makes coercion a threat to free choice from the volitionalist perspective.

To understand how a religious impact on an individual can be caused by events over which she has no free choice, it is helpful to see the nonvolitionalist view as positing an interrelated religious universe. People, like other creatures and objects, are a part of an integrated whole. A change in some other part of that universe may cause religious effects on an individual through a kind of ripple effect, even if she had no choice or control over that change. Thus, the individual's susceptibility to religious effects beyond her control is central to the nonvolitionalist religious experience.[15]

The distinction between volitionalism and nonvolitionalism, then, concerns most immediately the role of individual free choice in generating moral or religious consequences. The differing views of human agency presented by volitionalism and nonvolitionalism have implications, however, for diverse issues far beyond this central one. The next section will explore some of the manifestations and implications of volitionalism in law, philosophy, and religion.

B. Volitionalism

If volitionalism were merely a theoretical construct, a model designed to fit the facts of certain Supreme Court cases and nothing more, then it might be valuable as description, but it would lack explanatory power. Explanation requires insight into the cultural assumptions to which courts respond. Volitionalism is very much a part of those cultural assumptions. It is the basis of most of our everyday moral judgments about ourselves and others, and it is also deeply embedded in the legal, religious, and philosophical traditions on which modern American culture is constructed. The very pervasiveness of volitionalist assumptions makes them easy to overlook and, perhaps, easy to impose unthinkingly on those who do not share them.

1. *Volitionalism in the Law*

Volitionalism is part of the foundation of the Anglo-American concept of legal responsibility. In widely disparate areas of the legal system, we find a strikingly similar reliance on individual free choice as the basis for imposing legal liability. Other considerations, including issues of practical application and fairness across cases, have influenced the particular formulations of legal rules regarding when liability is appropriate. The exclusive focus on volitionalism in the following analysis is, therefore, not intended to demonstrate that volitionalism is the only, or even the single most important factor gniding the ascription of legal liability. Volitionalism is, however,

15 *See infra* text accompanying notes 322-36.

one significant, perhaps indispensable, assumption of our legal system.

The most general legal implication of the volitionalist view is the individuation of legal liability. Although it is possible for a legal system to place responsibility for an individual's actions on the family, work group, or neighborhood of which he is a member,[16] the Anglo-American legal system generally does not hold persons liable for the acts of others.[17] Since choice is the foundation for liability, and is understood as an individual volitional act, our legal system is dominated by an individualized notion of liability. The deep unfairness that we perceive in punishing one person for the acts of another derives, at least in part, from this volitionalist reliance on individual choice.[18]

It is possible to conceive of choice as an act taking place on some level other than that of the individual human being. For instance, choice may be a social act, as when a group must reach a decision together. Or, choice may also be the act of only one of the personalities within a single human being, as in the common experience of a battle of "competing identities."[19] If American cultures fully recognized either of these alternatives, then an emphasis on choice would not necessarily lead to the individualistic version of responsibility which currently dominates the law. The inclusion of an explicitly individualistic notion of choice within volitionalism best explains present concepts of legal responsibility.[20]

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16 *See* HENRY MAINE, ANCIENT LAW 104-05 (1861) (in ancient law, a family was responsible for actions of its members; an individual's moral status depended on the group of which he was a member); Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 556 (1933) ("The older view held the family, tribe, or nation responsible for the acts of any one individual . . . ."); *see also* HENRY BERMAN, JUSTICE IN THE U.S.S.R. 297 (1963) (discussing "the strong Russian cultural tradition of collective responsibility for individual misconduct"); SYBILLE VAN DER SPRENKEL, LEGAL INSTITUTIONS IN MANCHU CHINA 47 (1962) ("The edict of 1708 . . . stressed the principle of group responsibility for misdeeds of members, an idea with deep roots in China."). *But cf.* SALLY FALK MOORE, LAW AS PROCESS 111-26 (1978) (arguing that although collective obligations appear to correspond to collective responsibility from the outside, from the perspective of an insider, members are held individually responsible).

17 *See* Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91, 103 (1985); Francis Bowes Sayre, *Criminal Responsibility for the Act of Another*, 43 HARV. L. REV. 689, 702 (1930) (traditional basis of criminal liability is intensely personal). For a general discussion of the contrary claim that "we are all responsible for everything," see HERBERT MORRIS, GUILT AND INNOCENCE 111 (1976) (essay on "Shared Guilt").

18 *Cf.* Enmund v. Florida, 458 U.S. 782, 798 (1982) (holding that one who does not himself intentionally kill or attempt to kill cannot constitutionally be subject to the death penalty).

19 *See* MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 62-63 (1982) (describing intersubjective and intrasubjective conceptions of the self).

20 *See* Cohen, *supra* note 16, at 558-59 ("Back of this faith of legal individualism is the modern metaphysical assumption that the atomic or individual mind is the supreme

The exceptions to this general rule of individualized liability serve only to highlight the volitionalist assumptions that underlie this approach. First, we hold an actor liable for the acts of another when the other is a legal agent acting within the scope of her agency.[21] The principal has a general right to control the acts of the agent when the agent is acting within the scope of her agency.[22] The principal's ability to choose whether or not to exercise this right is an important part of the foundation for her liability.[23] Even if the choice is actually nothing more than a legal fiction, the importance of the choice in justifying the imposition of liability reveals the underlying volitionalist assumptions.

Second, we also hold persons legally liable for the acts of others who are seen as extensions of the person rather than as individuals in their own right. For example, parents are liable in many cases for the behavior of their minor children.[24] Similarly, husbands were once liable for the behavior of their wives because the law understood the wife to be an extension of the husband rather than a fully separate person.[25] Parental legal liability reflects the legal reality of parental control and the implication of parental culpability for a failure to choose to exercise properly that control.[26]

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reality and the theologic view that sin is an act of individual free-will, without which there can be no responsibility.").

It is worth noting, however, that even a version of volitionalism that lacked this individualism—one that recognized choice on other levels as well—would still fail to account for nonvolitionalist claims such as those in the sacred land cases. In a volitionalist scheme, group choice could lead to religious consequences only for the group that chose (and perhaps its individual members, on an agency theory). But in a sacred land case, it is the government, and not the Indian tribe, that makes the choice that causes the religious harms. Thus, in a volitionalist scheme, neither the individual Indians nor the tribe as a whole should suffer any religious consequences since they were not responsible for the choice that caused those consequences.

21 *See* RESTATEMENT (SECOND) OF AGENCY § 140 (1958).

22 *Id.* § 14.

23 The implicit choice to control, or not to control, is one of the two explanations offered in the commentary in the *Restatement* for the principal's liability for the unauthorized tortious actions of his agent: "[L]iability is normally based upon the fact that the tort is brought about in the course of an undertaking for the benefit, and subject to the right, of the principal to control his servant or other agent." *Id.* The other explanation—that the principal benefits from the agent's action—is not volitionalist. Volitionalism is not the only principle that influenced the structure of agency law, but it is one of the important ones.

24 *See* RESTATEMENT (SECOND) OF TORTS § 316 (1965).

25 *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ch. XV, § III. In Blackstone's immortal words: "[T]he husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection and *cover*, she performs every thing . . . ." *Id.* at *430 (emphasis in original).

26 *See* RESTATEMENT (SECOND) OF TORTS § 316(a) & comments a & b (1965). The right to control alone, without the ability to exercise meaningful choice about it, would be insufficient. For example, if a parent has the legal right to control a child, but is

Volitionalism also pervades the areas of contract and criminal law. Indeed, legal doctrine in these areas illustrates an important distinction between two forms of volitionalism. First, as in contract theory, free choice may be the foundation for the relevant behavioral rules themselves. A contract represents a choice to bind oneself to a set of norms; without that choice the rules in the contract generally lack any independent force. But even if one rejects this first type of volitionalism, and asserts that some norms may be morally or legally binding regardless of whether they are chosen by those to whom they apply, a milder form of volitionalism remains. In this second form, the relevant rules may have their source in something other than the individual's choice, but she is morally liable to punishment for violating them only if the particular violation was a result of her own free choice. For example, a criminal law may be binding regardless of the choice of the individual to recognize it, but one who violates it through coercion, insanity, or fraud—*i.e.*, without free choice—will not be legally culpable for that violation. The courts' version of volitionalism in the free exercise cases we shall discuss is of this second, milder variety.[27]

Contract law might well serve as the paradigm for a thoroughly volitionalist system of liability.[28] According to classical contract theory, it is only because of the free choice of the individual parties that they are bound at all. Thus, the *sine qua non* of an enforceable contract is that such a choice must have been made.[29] Choice, in other

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physically incapable of supervising the child, we would not hold him legally responsible for the child's behavior during that time. *See* Seibert v. Morris, 252 Wis. 460, 463, 32 N.W.2d 239, 240 (1948).

It has been suggested that the traditional view of criminal accomplice liability is based on a similar "forfeit[ure] of personal identity," a forfeiture that operates even in the absence of any meaningful control over the behavior of the primary actor. *See* Dressler, *supra* note 17, at 111. "[W]hen an accomplice chooses to become a part of the criminal activity of another, she says in essence,'your acts are my acts,' and forfeits her personal identity." *Id.* Here, too, choice is essential: not the choice to control the actions of the other, but the choice to join oneself in some way to the criminal activity. The legal emphasis on intent reflects the importance of this choice as the foundation for responsibility. *Cf. id.* at 109.

27 In these cases, the courts do not demand that the religious beliefs themselves must be acquired through an act of free choice, but only that the activities that cause the religious effect must be ones freely chosen by the individuals who suffer those effects. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963) (ignoring entirely the genesis of Mrs. Sherbert's beliefs and focusing instead on the coercion of her present choice to abstain from work on her Sabbath); *see also infra* notes 108-21 and accompanying text.

28 It should, therefore, be unsurprising that the contract metaphor has provided the foundation for much volitionalist political theory. *See, e.g.*, JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 54-55 (Thomas P. Peardon ed. 1952). Indeed, the connection between social contract theory and classical contract law is historical as well as conceptual. *See* PATRICK S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 39-41 (1979).

29 *See* CHARLES FRIED, CONTRACT AS PROMISE 16 (1981); Randy E. Barnett, *A Consent*

words, is the foundation for the legitimacy of the specific norms that will be contractually enforced.[30]

Many of the defenses to a contract claim reflect this volitionalist assumption: a contract is void or voidable if the necessary free choice was not exercised in the case at hand. Fraud and duress are conditions that interfere with the ability of a person otherwise capable of choice to make a free choice in particular situations; infancy and incapacity disable a person from choosing more generally; and even mistake and impracticability provide a defense when circumstances, which could not have been or were not foreseen, vitiate the possibility of a meaningful choice.[31]

Criminal law provides an example of the milder form of volitionalism. Criminal obligations, like many religious ones, are imposed externally and their legitimacy is not dependent on the individual's choice to accept them.[32] However, the legitimacy of imposing punishment for their violation is premised upon the belief that those punished chose to commit criminal acts. Criminal liability rests on the assumption that individuals are autonomous, self-controlled persons whose actions are caused, at least in significant

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Theory of Contract, 86 COLUM. L. REV. 269, 272 (1986); A.S. Burrows, *Contract, Tort, and Restitution—A Satisfactory Division or Not?* 99 LAW Q. REV. 217, 258 (1983); Cohen, *supra* note 16, at 557 ("The significance for the law of contract of this notion of individual responsibility for voluntary acts is too obvious to need development."). There are those who would challenge this traditional view and propose other bases for the legitimacy of contracts. *See, e.g.*, *id.* at 571-78 (criticizing the promise and will theories of contract); *id.* at 591 (argning that "the roots of the law of contract are many rather than one"). We do not endorse the classical theory as the best model to gnide the future of contract law, but we do believe that it is an indispensable part of any sufficient explanation of its past. *See* P. ATIYAH, *supra* note 28, at 1-7 (arguing that benefit-based and reliance-based models are gaining gronnd and should be openly recognized, but pointing out that the promise-based model is part of our legal and cultural heritage and depends on a belief in individual responsibility and free choice).

30 Various contract theories disagree about the extent of volition required to generate contractual obligation. The volitional act of "choice" is, perhaps, stronger than "consent," which may itself be stronger than an act that is merely not involuntary. *See* Barnett, *supra* note 29, at 319 (contrasting his own "consent" theory with a "will" or choice theory); *see also* ARISTOTLE, NICHOMACHEAN ETHICS bk. III, ch. ii (Richard P. McKeon ed. 1947) (contrasting choice, which is deliberative and purposive, with the merely voluntary, which is within one's own power and not done through ignorance or coercion). Our use of the word "choice" is not intended to suggest a position on this issue. We will use "choice," "will," and "volition" interchangeably because the degree of volitional activity (or of cognitive activity accompanying it) is not significant to our argument. Our point is that all of these theories are volitionalist in the sense that they all see an exercise of free individual volition as the essential precondition of liability.

31 *See* P. ATIYAH, *supra* note 28, at 407; Barnett, *supra* note 29, at 318.

32 Arguably, the legitimacy of criminal laws also derives ultimately from choice, in the form of the consent of the governed through their elected representatives. But even if we reject this argument and adopt some other basis for criminal law (*e.g.*, moral law), the criminal law still exhibits the milder form of volitionalism: responsibility for a particular action, violating or fulfilling a law, is based on choice.

part, by their own free choices.[33] According to the volitionalist view, punishment and blame are inappropriate where this assumption is proven false.[34]

Many commentators have understood the insanity defense, for example, as positing that this assumption of the existence of free choice is inaccurate in cases of mental illness; therefore, the normal legal and moral liability for the act should not attach to the defendant.[35] Insanity is a defense, and not merely a consideration in sentencing, because, from a volitionalist perspective, the inability to choose destroys the very foundation of personal liability rather than simply reducing the degree of blameworthiness.

Nor is volitionalism confined to the common and statutory law; certain parts of the Constitution also reflect a volitionalist view of liability.[36] For example, under the due process clauses of the fifth and fourteenth amendments, laws must give adequate notice of which acts are criminally punishable. Vagueness undermines this notice and may therefore amount to a denial of due process.[37] From a volitionalist view, notice is essential because culpability depends on the choice to violate one's obligations. Without adequate notice of these obligations, this choice can never be exercised and culpability cannot attach.[38]

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33 *See* JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 165-66 (1947) ("[O]ur criminal law rests precisely upon the same foundation as does our traditional ethics: human beings are 'responsible' for their volitional conduct."); H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 39-40, 181-83 (1968) ("there must be a 'voluntary' action if legal punishment or moral censure is to be morally permissible"); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 88-91 (1987) (discussing the use of determinist and intentionalist dicourse in criminal law); Thomas E. Davitt, *Criminal Responsibility and Punishment*, in RESPONSIBILITY 143 (Carl J. Friedrich ed. 1960) ("Prerequired for criminal guilt is responsibility for one's actions. Such answerability derives from knowing, free decision.").

34 There are deviations from the volitionalist view, for example, in strict liability offenses. Nonetheless, volitionalism appears to be the starting point and the burden of justification rests on those who would deviate from it. *See* Morissette v. United States, 342 U.S. 246, 250-63 (1952).

35 *See, e.g.*, HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE 306-10 (1979); DONALD H.J. HERMANN, THE INSANITY DEFENSE: PHILOSOPHICAL, HISTORICAL & LEGAL PERSPECTIVES 74-75 (1983); PETER W. LOW, JOHN CALVIN JEFFRIES & RICHARD J. BONNIE, CRIMINAL LAW 692-93 (1982); HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 132-34 (1968); Jerome Hall, *Psychiatry and Criminal Responsibility*, 65 YALE L.J. 761, 765 (1956); Sanford H. Kadish, *The Decline of Innocence*, 26 CAMBRIDGE L.J. 273, 273-75 (1968). *But cf.* MICHAEL MOORE, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP (1984) (focusing on the loss of the ability to engage in practical reasoning as the justification for the insanity defense).

36 *See infra* text accompanying notes 179-88.

37 *See* Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

38 *See* LON FULLER, THE MORALITY OF THE LAW 39 (1964) ("Certainly there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that . . . is kept secret from bim, or . . . was unintelligible . . . ."); John C. Jeffries,

There is, in short, widespread legal acceptance of a volitionalist notion of liability. In fact, the concept may be late in coming to the interpretation of the free exercise clause only because it is so deeply embedded in our legal culture that it has remained almost unchallenged until recently. This cultural hegemony extends, however, far beyond law. Volitionalism's roots run deep in the religious and philosophical traditions that have shaped our legal culture.

2. *Volitionalism in Religion and Philosophy*

Judaeo-Christian religion contains a powerful strand of volitionalism. Although the three major religions we will discuss also include some important nonvolitionalist elements, volitionalism has come to dominate American religious understanding.

In the Jewish tradition, the volitionalist view is evident in the intricate system of rules and exceptions that constitutes religious law and its centrality to the religion.[39] Jewish theology strongly asserts both that the human will is free, that is, undetermined,[40] and that reward and punishment depend upon an individual's efforts to understand and fulfill his responsibilities under God's law.[41] The strong ethical focus of twentieth century American Judaism builds on a volitionalist tradition in which individual choice and liability under the law are central.

There are also important nonvolitionalist elements of Judaism. Many of these, for example, the communal and seasonal aspects of religious practice, are based as much on folk culture as on self-conscious theology. However, others may actually serve theological functions through a nonvolitionalist means. For example, the con-

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Legality, Vagueness, and the Construction of Penal Statutes, 71 VAND. L. REV. 189, 211 (1985); Note, *Due Process Requirements of Definiteness in Statutes*, 62 HARV. L. REV. 77, 78 & n.8 (1948).

As should be plain from the discussion of nonvolitionalism later in this section, *see infra* notes 66-98 and accompanying text, notice may be completely irrelevant from a nonvolitionalist perspective. For example, it would be religiously insignificant to the Navajo whether they were previously notified of the flooding of Rainbow Bridge Canyon. Such notice would have practical significance for their ability to prevent the flooding, but it would have no religious significance. They would suffer exactly the same religious consequences from the flooding whether or not they had prior notice. Similarly, it would be irrelevant whether or not they knew beforehand that the location was a sacred site that should not be flooded. Even if they were unaware of the significance of the site, the religious consequences of flooding the canyon and drowning the gods would be the same.

39 *See* MORRIS JOSEPH, JUDAISM AS CREED AND LIFE 179-81 (1903); *see generally* JACOB LOUIS KADUSHIN, JEWISH CODE OF JURISPRUDENCE (1915); THE PRINCIPLES OF JEWISH LAW (Menachem Elon ed. 1975).

40 *See* L. JACOBS, PRINCIPLES OF THE JEWISH FAITH 323; M. JOSEPH, *supra* note 39, at 100-02; A MAIMONIDES READER 77-78 (Isadore Twersky ed. 1972).

41 LEO BAECK, GOD AND MAN IN JUDAISM 46-47; L. JACOBS, *supra* note 40, at 355; M. JOSEPH, *supra* note 39, at 121-22; A. MAIMONIDES READER, *supra* note 40, at 81-83.

cept of the Jews as a chosen people appears to be largely nonvolitionalist.[42] Certainly, individual Jews born now, thousands of years after the original covenant, receive this special status not because of any choices of their own, but because God willed it to be so.[43] Even Abraham, the original party to the covenant, seems to have been chosen by God rather than choosing God.[44] The modern controversy over how to interpret the story of the covenant—chosen for what? chosen over whom?—is an eloquent testimony to the difficulty of incorporating a nonvolitionalist element into a largely volitionalist religious view.[45]

In the Catholic tradition, strong volitionalist inclinations are apparent in the theological emphasis on free will[46] and individual salvation.[47] Although God's grace is necessary to salvation, grace[48] is also assured to all on condition of obedience.[49] Man's role is thus to obey, to rigorously fulfill his obligations concerning his own behavior and belief.[50] The religious destiny of each individual rests on his own free choices: if he fills his life with good works,[51] avoids the pitfalls of sin,[52] and holds to his faith, he will enter Heaven.

Once again, Catholicism also includes a variety of cultural and theological nonvolitionalist elements. One of the most interesting is the role of the institutional Church in individual salvation.[53] The Catholic Church has held itself as the unique way and path to salvation. The Pope, in direct succession from Saint Peter, holds the keys to Heaven.[54] As a result, those virtuous persons who lived in a place

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42 *See* SACVAN BERCOVITCH, THE AMERICAN JEREMIAD 31-32 (1978).

43 *See* M. JOSEPH, *supra* note 39, at 113-15 (acknowledging that although there is some volitional aspect on the part of the chosen, the initial choice is God's).

44 *Id.* at 113.

45 *Compare id.* at 115-19 (chosen to serve, suffer, and spread the truth) *with* Moses Maimonides, *Epistel to Yemen*, in A MAIMONIDES READER, *supra* note 40, at 439-40 (chosen to receive the Law and to be protected from destruction by the Lord).

46 *See* THOMAS AQUINAS, SUMMA THEOLOGICA question 6 (1952); WILLIAM N. CLARKE, AN OUTLINE OF CHRISTIAN THEOLOGY 198 (1898); KARL RAHNER, FOUNDATIONS OF CHRISTIAN FAITH 39, 44 (1978).

47 *See* T. AQUINAS, *supra* note 46, question 87; W. CLARK, *supra* note 46, at 331; RICHARD P. MCBRIEN, CATHOLICISM 144 (1981).

48 *See* T. AQUINAS, *supra* note 46, question 109.

49 *See id.* question 23; R. MCBRIEN, *supra* note 47, at 309.

50 *See* K. RAHNER, *supra* note 46, at 407.

51 *See* T. AQUINAS, *supra* note 46, question 5; R. MCBRIEN, *supra* note 47, at 968.

52 *See* T. AQUINAS, *supra* note 46, questions 19-21; W. CLARKE, *supra* note 46, at 247-53.

53 *See* Donald Hendricks, *What is a Catholic?* in RELIGIONS OF AMERICA 40-41 (L. Rosten ed. 1975).

54 *See* Pope Innocent III, *Letter to the Emperor Alexius of Constantinople (1201)*, in THE CRISIS OF CHURCH AND STATE 1050-1300, 133 (Brian Tierney ed. 1964) ("[A]nyone who fails to acknowledge Peter and his successors as pastors and teachers is outside [the Lord's] flock."). This may no longer be the position of the Catholic Church. *See* R. MCBRIEN, *supra* note 47, at 724.

and time in which they had no access to the teachings and practices of the Church would be incapable of entering Heaven.[55] This doctrine is nonvolitionalist in that such persons suffer religious consequences because of an accident of birth over which they had no free choice or control. The predominant volitionalist focus of the Catholic tradition is demonstrated by the fact that generations of believers found this doctrine problematic, and expended great energy to make it more consistent with volitionalism by providing an intermediate status and alternative path to Heaven for such persons.

The rise of free-will Protestantism in America marked the pinnacle of Protestant volitionalism. The essence of free-will Protestantism, which swept the country through revivals during the early nineteenth century, was the importance of choice to the Christian life: the choice to accept Jesus Christ and be saved and the choice thereafter to live in accordance with the moral law set out in the Bible.[56] Human beings were fully responsible for their own religious fates.

This volitionalist focus characterized the new strains of Methodism, Baptism, and Unitarianism and distinguished them from older sects such as the Congregationalists and Presbyterians. These older groups maintained, at least formally, that God provided both grace and the ability to fulfill the divine law without regard to the choices of individuals.[57] Today, however, even the members of technically nonvolitionalist sects often hold basically volitionalist views. Indeed, in actual practice, modern American Protestantism may be the most thoroughly volitionalist of the major American religions.[58]

Thus, the major religious traditions that have shaped American culture share a predominantly volitionalist focus. All three have struggled, to one extent or another, to adapt their occasional nonvolitionalist doctrines to this basically volitionalist view. And all have fit reasonably well into the volitionalist secular culture of twentieth century America.

Similarly, the Western philosophical tradition reflects the concerns of a volitionalist world view. Ethical philosophy has long been preoccupied with the relationship between individual free choice and the imposition of moral praise and blame, punishment and re-

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55 *See, e.g.*, DANTE ALIGHIERI, THE INFERNO canto 4, ll. 30-63.

56 *See infra* notes 422-26 and accompanying text.

57 *See infra* notes 384-94 and accompanying text.

58 We discuss the nonvolitionalist elements of Protestantism extant at the time of the drafting of the Constitution in great detail in Section Five. *See infra* notes 322-70 and accompanying text.

ward.[59] Although the debate continues to rage, the perceived inconsistency between determinism and the imposition of moral consequences clearly arises from the volitionalist assumption that liability for consequences can rest only on free choice, and free choice can exist only in the absence of complete causal determinism.

Volitionalism is a prescriptive claim about the basis for liability to religious consequences. It, nonetheless, holds implications for the descriptive psychological or metaphysical issue of determinism and free will. Human beings must possess free will, in the sense of a power to the contrary, or no one could ever be liable under a volitionalist theory.[60] To the extent that determinism denies the existence of free will it is inconsistent with volitionalism.

The volitionalist position in moral philosophy existed at least as early as Plato's middle period.[61] Many philosophers still argue that some type of contra-causal free choice is a necessary foundation for the appropriate imposition of moral consequences,[62] or at least a necessary part of the layman's understanding of the foundation of

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59 *See generally* DETERMINISM AND FREEDOM IN THE AGE OF MODERN SCIENCE (Sidney Hook ed. 1958); FREEDOM AND RESPONSIBILITY (Herbert Morris ed. 1961).

60 *See supra* notes 11-12 and accompanying text.

61 *See* MARTHA CRAVEN NUSSBAUM, THE FRAGILITY OF GOODNESS 1-21, 87-164 (1988). Nussbaum distinguishes between a self-sufficient life immune to luck and a life subject to both the risks and the beauties of tuche. Her categories are not identical to our distinction between volitionalist and nonvolitionalist beliefs, but they are very closely related. Her view extends far beyond legal, religious, or secular morality, wbile ours is concerned only with the cause of moral consequences. Nonetheless, as she recoguizes in her frequent references to Kantianism, a volitionalist view of morality is one of the primary mechanisms through which people have attempted to achieve immunity from both natural and social contingencies. To the extent that Plato sought such immunity, and sought it in the workings of the individual human soul and its capacity for self-control, he can be described as at least a proto-volitionalist.

Aristotle is also sometimes identified with a volitionalist position, but he is probably more accurately described as a nonvolitionalist in our terms. *See* WILLIAM CHASE GREENE, MOIRA: FATE, GOOD, AND EVIL IN GREEK THOUGHT 327-28 (1944). Aristotle's evaluation of the praiseworthiness or blameworthiness of particular actions in the *Nichomachean Ethics* relies on the apparently volitionalist premise that ouly voluntary actions give rise to praise or blame. *See* ARISTOTLE, *supra* note 30, at bk. V., ch. 2 viii.1-3. Aristotle's explicitly will-based position may be less volitionalist than it appears because the voluntary act need not be free, in the sense of undetermined, in order to satisfy Aristotle's criteria. *See* M. NUSSBAUM, *supra* note 61, at 273-76 (arguing that "voluntary" actions for Aristotle were not free from all contingency or vulnerability to external forces). Thus, non-free cboices, in our terms, could give rise to moral consequences for Aristotle.

62 *See, e.g.*, C.A. Campbell, *Is "Free Will" a Pseudo-Problem?*, LX MIND 441, 445-58 (1951) (arguing that attempts to define the conditions of moral responsibility in a way consistent with causal determinism are ineffective because, *inter alia*, they misunderstand "the important truth that it is only as expressions of *will* or *choice* that acts are of moral import," *id.* at 455, and that one must have been free to choose otherwise); Morton White, *Oughts and Cans*, in THE IDEA OF FREEDOM 215-16 (Alan Ryan ed. 1979) (the relationship between undetermined choice and moral praise and blame is one of moral, but not logical or conceptual, necessity).

moral responsibility.[63] There are, of course, those who reject the volitionalist premises entirely.[64] More often, however, the philosophical debate centers on salvaging at least parts of the volitionalist basis of moral liability by finding room for free will or free choice of some kind (or from some perspective) in a scientifically determinist world.[65] In other words, the terms of the debate in modern philosophy are still largely set by its volitionalist antecedents.

Volitionalism, then, pervades our legal, religious, and intellectual culture. In fact, the volitionalist perspective is so common, so unquestioned, that it may be difficult even to imagine an alternative. The next subsection will, therefore, define and describe nonvolitionalism.

C. Nonvolitionalism

The nonvolitionalist view of religion and reality may, at first, seem very alien to most Americans. In this view, the individual's religious fate is significantly dependent upon forces beyond his control. A predominantly nonvolitionalist religion may have no ethical code at all, consisting instead of a metaphysical explanation of why or how religious results come to pass, without any prescriptive force.[66] These religions also may include no propositional knowl-

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63 *See* ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY xii (1969) (praise, blame, choice, and responsibility, as presently understood, are inconsistent with determinism); FRANCIS H. BRADLEY, ETHICAL STUDIES 6-7 (1927) (in the vulgar view, "the deed must issue from my will" in order for me to be held responsible). *See generally* W. DAVID ROSS, FOUNDATIONS OF ETHICS 222-51 (1939) (discussing what freedom and responsibility mean in a world in which all human behavior is causally determined and the extent to which such meanings are consistent with everyday usage and intuitions).

64 *See* GILBERT RYLE, THE CONCEPT OF MIND 62-69 (1949); B.F. SKINNER, BEYOND FREEDOM AND DIGNITY (1971); GABRIEL DE TARDE, PENAL PHILOSOPHY 83-89 (Howell trans. 1912).

65 *See, e.g.*, DANIEL DENNETT, BRAINSTORMS 233-55 (1978) (responsibility is possible from the intentional stance, which can never be abandoned, and is consistent with the simultaneous truth of mechanistic explanation); JOHN L. MACKIE, ETHICS 203-26 (1977); Carl Ginet, *Might We Have No Choice?*, in FREEDOM AND DETERMINISM 87 (Keith Lehrer ed. 1966); Stuart Hampshire, *Freedom and Explanation*, in THE IDEA OF FREEDOM, *supra* note 62, at 61-75; Keith Lehrer, *An Empirical Disproof of Determinism?*, in FREEDOM AND DETERMINISM, *supra*, at 175; Wilfred Sellars, *Thought and Action*, in FREEDOM AND DETERMINISM, *supra*, at 105.

66 Volitionalist religions, since they focus on individual choice as the basis for moral responsibility, tend to be quite "homo-centric." That is, the human being who chooses is the central focus of religious concern. Nonvolitionalist religions, on the other hand, recognize various spiritual forces outside the individual that control his religious destiny regardless of his own choices. Such religions might, therefore, be called "sacro-centric": their primary concern is with all spiritually effective forces and is not limited to human action or choice. *See, e.g.*, WILLIAM BOUWSMA, JOHN CALVIN: A SIXTEENTH CENTURY PORTRAIT 167, 172-74 (1988) (discussing Calvin's belief that God controls everything, including all human action); MIRCEA ELIADE, THE SACRED AND THE PROFANE: THE NATURE OF RELIGION 116-28 (1959).

edge at all, ethical or metaphysical, but only a personal experience of God.[67] Even if it does place certain ethical demands on the individual, however, a nonvolitionalist religion will sometimes hold him liable for violating those demands whether or not the violation resulted from his own free choices. A person may strive to keep his own behavior and beliefs within the prescribed path and yet still suffer religious harm (*e.g.*, damnation or the loss of spiritual power) for a violation over which he had no choice or control.[68]

The essence of the nonvolitionalist view is that something other than the individual's free choices can determine his religious fate.[69] The central moral or religious fact—the fact that generates moral or religious consequences for the person—is not his individual free choice. Instead, it is his existence within a religious universe over which he has, at most, only limited choice or control.

Some examples of nonvolitionalist beliefs may clarify the concept. There are at least two different ways in which such an extant religious order might create consequences for an individual, independent of his own free choices. First, a spiritual power, such as God, may have ordained certain religious consequences for the individual. No human action, chosen or otherwise, undertaken by the individual or other persons or groups, can affect that result. This is commonly called predestination.[70] A second version of nonvolitionalism holds that the actions of persons do create moral or religious consequences, whether or not those actions were the product of free choice. Those consequences may be limited to the actor or they may affect other persons, but neither case requires free choice for liability to moral consequences. The difference between these two versions is that the first completely denies the efficacy of human action in generating certain religious consequences, while the second does not. Both are nonvolitionalist, however, because both hold

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67 *See* HARVEY COX, RELIGION IN THE SECULAR CITY 56-57 (1984) (describing the "modern theological notion that 'there are no revealed ideas,' and that faith is a personal encounter with God which carries with it no necessary cognitive content").

68 *Cf.* M. NUSSBAUM, *supra* note 61, at 89 ("Tuche [luck] does not imply randomness or absence of causal connections. Its basic meaning is 'what just happens'; it is the element of human existence that humans do not control.").

69 *Cf. id.* at 32-41. Nussbaum argues that the recognition of inconsistent moral claims leads to the conclusion that choice is not all: you can make the "right" choice, the best choice under the circumstances, and still be guilty because you still have done something evil. To deny that it is evil, as a volitionalist perspective would require, is to falsify the emotional reality of such situations. *See also* THOMAS NAGEL, MORTAL QUESTIONS 24-38 (1979) (our moral judgments depend, in part, on events controlled by luck); BERNARD WILLIAMS, MORAL LUCK 20-30, 74 (1981) (same).

70 This common term may not be technically accurate in light of the theology of the groups involved. We discuss the technical meaning in a later section, *see infra* notes 322-36 and accompanying text; the usage here is colloquial rather than theological.

that something other than the free choices of a particular individual can create religious consequences for that individual.

Predestinarian Calvinism exemplifies the first kind of nonvolitionalism. In strict predestinarian Calvinism, the individual's religious fate—his ultimate salvation—is not dependent on any human choice or action; it is ordained by God. God decides, at some unknown time (or out of time) and in some incomprehensible manner, who will be saved, and gives those persons His grace. In such a predestinarian world, human beings cannot avoid action and the experience of choosing, but the character of their choices and actions does not determine the moral or religious consequences for them. A virtuous demeanor may often accompany a saved soul, but virtue does not necessarily lead to grace.[71]

The second type of nonvolitionalism holds that human actions can create moral and religious consequences for the actor or for others, regardless of whether the actions result from a free choice. To explain why these actions have such effects, this type of nonvolitionalism often posits that the physical world and the moral or religious realm are not separate.[72] In such a sacralized cosmos,[73] natural features and events (like mountains and rain) have moral and religious significance. Such sacred objects or events do not simply represent the divine; rather, they are simultaneously a part of a spiritual reality and a secular reality.[74] In other words, the moral or religious order of the universe exists through and in the natural, and perhaps social, features of the world.[75] Disruption of the natural or social order, for example, by taking land out of its natural state or challenging the social authority of traditional religious leaders, may disrupt the moral order.[76] Such disruption leads to moral consequences.

The individual's role in such a sacralized cosmos is simply to exist as a part of this harmonious and well-balanced moral/material order. If an individual takes action that disturbs that order, regardless of whether that action flows from his own choice or from forces beyond his control, his punishment may be necessary to restore the natural equilibrium. His actions, not his choices, are the foundation

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71 *See infra* notes 327-29 and accompanying text.

72 *See, e.g.*, WERNER JAEGER, PAIDEIA 160 (Gilbert Highet trans. 2d ed. 1945) (describing Anaximander's belief in a moral standard guiding natural phenomena); *cf. id.* at 276-78 (describing the role of balance and proportion in Sophoclean tragedy).

73 *See* M. ELIADE, *supra* note 66, at 11-13.

74 *See id.* at 116-18.

75 *See, e.g.*, HILL SMITH, THE RELIGIONS OF MEN 199-200 (1958) (discussing the Tao as the way of the universe, simultaneously immanent and transcendent); LLOYD L. WEINREB, NATURAL LAW AND JUSTICE 17-20 (1987) (discussing pre-Socratic Greek notion of natural law as both a material and a normative order).

76 *See* M. ELIADE, *supra* note 66, at 47-50.

for his moral liability. Moreover, once the moral/material order is disturbed, persons other than the actor may also be unable to fulfill their proper functions. This inability may lead to moral or religious consequences for such persons even if they did not cause the initial disruption of the order.[77]

The Greek notion of a "telos" is an example of this nonvolitionalist integration of moral and material reality. A telos is a goal or end point that implies both moral and material completion. For the Greeks, natural categories—such as "hawks" or "human beings"—were defined, in part, in terms of the virtues that would make one of their members a perfected thing of its kind. Each member of such a category had a particular telos—a moral goal—simply by virtue of being a thing of that kind.[78] This concept represents an integration of material and moral reality because moral goals are largely determined by material definitions.[79]

Greek literature and drama, building on this vision of an interrelated moral and material universe, provide direct evidence of the second kind of volitionalism. The role of fate, "moira," in Greek drama illustrates the imposition of moral liability based on action even when the inexorable progress of destiny renders individual choice meaningless.[80] Oedipus, for example, was in no way culpable for his crimes from a volitionalist point of view: he had no means of knowing that the actions which appeared to fulfill all of his responsibilities actually violated his deepest duties.[81] Yet he is held liable and suffers moral retribution.[82] Similarly, both Antigone and Creon may be seen as moved, and doomed, by a fate beyond their control, but they are, nonetheless, completely morally liable for their own actions.[83] The Greeks ascribed moral blame or praise

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77 *See id.* at 33-34; L. WEINREB, *supra* note 75, at 18.

78 *Cf.* L. WEINREB, *supra* note 75, at 33 (the essence of an object is teleological; it is "the function for which the object is fit by its nature.").

79 *See* ALISDAIR MACINTYRE, AFTER VIRTUE 57-61, 148 (2d ed. 1984); *cf.* L. WEINREB, *supra* note 75, at 3 (discussing natural law, both in the Greek understanding and in modern jurisprudential terms, as a denial of the separation of "ought" and "is"). This position is referred to in modern philosophy as the "naturalistic fallacy": inferring an "ought" from an "is." *See* GEORGE E. MOORE, PRINCIPIA ETHICA (1903). It is a logical fallacy only if one rejects the possibility of the nonvolitionalist premise asserting that moral and material reality are united.

80 *See* ARTHUR ADKINS, MERIT AND RESPONSIBILITY 22-23 (1960); L. WEINREB, *supra* note 75, at 17. *See generally* W. GREEN, *supra* note 61 (discussing the role of fate in Greek thought).

81 *See* A. ADKINS, *supra* note 80, at 98; L. WEINREB, *supra* note 75, at 42.

82 *See* SOPHOCLES, OEDIPUS REX ll. 1310-1420 (David Grene trans. 1954).

83 *See* L. WEINREB, *supra* note 75, at 23. This description is only one interpretation and there are divergent viewpoints regarding how much scope is left for individual free choice in the Greek world view. Some, like Professor Weinreb, have argued that fate, or natural law, is both all-inclusive and inexorable. *See id.* at 25 ("The basic conception . . . was that the entire universe is governed by lawlike principles, which account fully for

based on the results of action, rather than on the intentions or efforts of the actor.[84] This emphasis on results follows naturally from the belief that moral and material reality are interrelated in a way that allows material changes, such as Oedipus's murder of his father, to cause far reaching moral effects, like the plagues affecting Thebes, regardless of the actor's choice or will.

In *Oedipus Rex* we find an example of how such disruptive actions can also lead to dire moral consequences for persons *other* than the actor. All of Thebes suffers because Oedipus transgressed.[85] The Greek notion of "pollution," which depends upon the interrelation of moral and material reality, explains why persons other than Oedipus suffer moral consequences.

Pollution is the existence of a material condition that disrupts the natural order.[86] As its name implies, however, "pollution," like "telos," has a moral as well as a physical character. For Sophocles and his audience, the natural and moral orders were not distinct. Thus, disruption of the physical or social world could cause moral repercussions. These repercussions function like ripples in a pond, affecting those who had no part in causing the disruption because they too are integrally a part of the natural, moral order. Thus, Oedipus's unpunished presence in Thebes, as well as his incestuous relationship with his mother, is a continuing pollution which brings a series of catastrophes on the whole city-state.[87] These moral consequences occur despite the fact that none of the other inhabitants of Thebes chose or acted to create or allow this pollution, or even

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what occurs in nature and human experience alike."). Others have suggested that while a particular act may be determined by fate or by the gods, the actor's attitude toward it, his recognition of its wrongness and his own moral responsibility for it despite his lack of choice, may be within his control. *See* M. NUSSBAUM, *supra* note 61, at 35-44. Still other interpreters have suggested that fate is almost always partial rather than complete, leaving much room for human freedom of action. *See* A. ADKINS, *supra* note 80, at 21 ("Homeric beliefs do not warrant any theory of determinism: Homeric man knows nothing of a 'clock-work' universe . . . ."). However, interpreters generally agree that Greek thought recognized that individuals were, at least sometimes, moved to act by forces beyond their own choice or control and that they were, nonetheless, morally responsible for such actions.

84 *See* W. GREENE, *supra* note 61, at 11.

85 SOPHOCLES, *supra* note 82, ll. 25-30.

86 *See* A. ADKINS, *supra* note 80, at 89; W. GREENE, *supra* note 61, at 98. Adkins calls this notion of pollution non-moral because it may lead to suffering for those who are not causally responsible for the pollution. *See* A. ADKINS, *supra* note 80, at 91. He thus reveals a cultural bias similar to the courts': any nonvolitionalist notion, like pollution, is by definition non-moral because volitionalism is the only possible moral system. He fails to recognize that the concept of pollution may be moral, may involve a moral or spiritual causality rather than a merely material one, even though it is not a volitionalist concept.

87 *See* A. ADKINS, *supra* note 80, at 95; SOPHOCLES, *supra* note 82, ll. 25-30.

knew that it existed.[88]

Similarly, the claims made in the sacred land cases fall into this second category of nonvolitionalism. The desecration of the Native Americans' sacred sites was not preordained by some spiritual power; the government's actions caused the disruption of the natural order. The resulting moral consequences follow from human action rather than being the product of some exclusively nonhuman force. This claim, therefore, is not predestinarian in nature.

It is, nonetheless, nonvolitionalist because the Indians will suffer the consequences of this disruption despite the fact that they did not in any way choose to create the disturbance. If the natural qualities of the Siskiyou Mountains are destroyed then vision quests will become ineffective and the Yurok, Karok, and Tolowa will be unable to acquire religious power, or "medicine."[89] This catastrophe does not depend upon the Indians' personal responsibility for the desecration in a volitionalist sense. They suffer this religious consequence not as punishment for their own choices, but simply because they are part of an interrelated universe and they feel the repercussions when the supporting moral order is attacked.

Many Native American religions are quite explicit in their view of the spiritual and material worlds as interrelated.

> The old way—what the Lakota call *wouncage*, "our way of doing"—is very consistent throughout the Indian nations, despite the great variety of cultures. The Indian cannot love the Creator and desecrate the earth, for Indian existence is not separable from Indian religion, which is not separable from the natural world.[90]

Instead of a world in which spiritual consequences flow only from "spiritual" acts such as choice, will, or belief, "the Indian religious perspective centers around the supernatural world, populated not only by gods and spirits but also by human beings, animals, plants and inanimate objects, for the supernatural breaks through into the

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88 We have now offered the Greeks as examples of volitionalism, *see supra* notes 61-65 and accompanying text, as well as this second form of nonvolitionalism. Some of this variability is due, of course, to changes in emphasis in Greek thought over time and among persons. For example, Aristotle's superficially volitionalist views are from a later period than the dramatic literature exhibiting nonvolitionalist attitudes. *See generally* A. ADKINS, *supra* note 80 (discussing the development from Homer to Aristotle of a more volitionalist view of responsibility). However, some of the variation is due to the fact that the Greek vision, to the extent that it existed as a single entity at any particular time, was a complex mixture containing elements of many different positions. *See* A. MACINTYRE, *supra* note 79, at 134-35.

89 *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 462 (1988) (Brennan, J., dissenting).

90 PETER MATTHIESSEN, INDIAN COUNTRY 9-10 (1984); *see* Alfonso Ortiz, *The Tewa World View*, in TEACHINGS FROM THE AMERICAN EARTH: INDIAN RELIGION AND PHILOSOPHY 179 (Denis Tedlock & Barbara Tedlock eds. 1975) [hereinafter TEACHINGS FROM THE AMERICAN EARTH].

everyday world."[91] It is this interpenetration of the religious and secular realms that allows one person's physical actions to have a religious consequence for another: a change in the physical world *is* a change in the religious order and that order affects all people.

Thus, many aspects of American Indian religions, particularly those aspects dealing with sacred sites, are strongly nonvolitionalist in character. This distinguishes them from the primarily volitionalist religions that dominate the American religious scene, and from the largely volitionalist secular legal and philosophical traditions. Compared to volitionalist beliefs, nonvolitionalist beliefs may lead to a markedly different theological focus and to dissimilar religious practices. Perhaps most importantly for the purposes of this Article, however, government action may restrict nonvolitionalist religious practices in very different and less obvious ways than it restricts volitionalist practices.

Indeed, government action may impact in strikingly different ways on volitionalist and nonvolitionalist religious beliefs and practices. Further, from the volitionalist perspective, the impact on the nonvolitionalist belief will not appear to be an interference with the free exercise of religion at all. Consider the following examples.

In the first example, the believer asserts that he will suffer a religious harm if he chooses to work on his Sabbath. The individual choice that leads to the religious consequence is, in turn, constrained by some government action: the believer is pressured into working on his Sabbath by the government's decision to deny him unemployment benefits if he refuses such work. The government action restricts the believer's activity through a mundane, secular means. No special, religious effect need be ascribed to the government in order to explain why the unemployment law constrains his choices; the restriction is explained by the plaintiff's rather obvious, nonreligious desire for the money. We will call this type of government impact on the individual "non-ascriptive,"[92] because the government's action does not itself give rise directly to a religious effect. In this first type of impact, the government constrains the

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91 AKE HULTKRANTZ, THE RELIGIONS OF THE AMERICAN INDIANS 14 (Monica Setterwall trans. 1979); *see also* A. Irving Hallowell, *Ojibwa Ontology, Behavior, and World View*, in TEACHINGS FROM THE AMERICAN EARTH, *supra* note 90, at 141, 145-49 (describing how the Ojibwa consider supernatural beings and some inanimate objects to be "persons.").

92 We intend "non-ascriptive" to have a particular, stipulated meaning: a "non-ascriptive" limit on individual conduct is one that is not caused by a direct religious effect ascribed to the activities of the government itself. "Non-ascriptive" regulations of individual activity may thus include laws prohibiting named conduct or laws conditioning benefits on the abandonment of named conduct. They may also include laws that coerce conduct in any other way, except as a result of religious effects ascribed directly to government action. For example, the govenment might "non-ascriptively" burden religion by erecting a wall around a shrine on public property.

plaintiff's individual choice and that individual choice is what will lead to religious consequences for the plaintiff. Thus, non-ascriptive impact is compatible with volitionalism.

In the second example, the believers argue that they will suffer a religious consequence—the loss of spiritual powers to be gained through a vision quest[93]—because of the government's action in building a road through a sacred location. Unlike in the previous example, the believers here cannot avoid the religious consequence by choosing to forgo a government benefit. Instead, they are faced with a situation in which the government has decided for secular reasons to use its own property in a way which would lead *directly* to religious consequences for them. The believers would suffer religious consequences due to government action, not because of any action or inaction they chose. Thus, the government action causes an ascriptive effect on the believers: in order to explain the effect on them, some direct religious efficacy must be ascribed to the government's actions. This is a nonvolitionalist type of impact.

Viewed through the lens of volitionalism, the government activity in this second claim does not place any burden on religious freedom since it does not interfere with any individual free choice to follow religious rules. From the nonvolitionalist perspective, the government activity does limit individual religious practice, because the vision quest will be futile if the site is desecrated. In order to perceive the limit on practice, one must acknowledge that the government itself—not just free choices by individuals—can directly give rise to religious consequences which affect individuals.[94] A volitionalist cannot acknowledge such a possibility. As a result, the volitionalist focus on free choice as the foundation for the appropriate imposition of moral or religious consequences leads to a refusal to recoguize this nonvolitionalist type of interference as a burden on religion at all.[95]

Many religions contain both volitionalist and nonvolitionalist elements in varying degrees, and therefore could be subject to both types of impacts.[96] This combination of elements is possible be-

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93 *See Lyng*, 485 U.S. at 448.

94 *See infra* notes 142-43 and accompanying text.

95 *Cf.* M. NUSSBAUM, *supra* note 61, at 329 (arguing that there is a "well-established tradition in moral philosophy, both ancient and modern, according to which moral goodness, that which is an appropriate object of ethical praise and blame, cannot be affected by external circumstances"). Nussbaum associates this tradition with both Plato and Kant, and notes that the latter's influence on modern philosophy cannot be overempbasized. *Id.* Focusing moral attention on the internal act of undetermined choice is one way to insulate moral judgments from the effects of external circumstances.

96 *See supra* notes 39-58, and accompanying text. Therefore, we talk about volitionalist and nonvolitionalist beliefs, impacts, and claims and not, generally, about volitionalist and nonvolitionalist religions.

cause religions sometimes recognize different types of religious consequences subject to different schemes of causality.[97] Despite these areas of overlap, however, religions with prominent nonvolitionalist beliefs will, of course, experience the greatest amount of nonvolitionalist interference. Only in the last few Terms have believers in such nonvolitionalist religions reached the Supreme Court with claims that clearly raised the issue of this nonvolitionalist type of interference.[98]

The sudden appearance of nonvolitionalist claims forced the background volitionalism, so prevalent in American culture, to the foreground. In a collection of cases involving Native American claimants, the Court dealt with the challenges posed by these nonvolitionist claims. The Court did not acknowledge the role of volitionalism in its decisions; perhaps the Court did not even recognize it. Nonetheless, it was, in large part, the nonvolitionalist character of these claims that led the Court to undertake a series of retreats in free exercise doctrine.

In the 1989-90 Term, this retrenchment culminated in the Court abandoning twenty-five years of free exercise clause jurisprudence. The Court has recently held that facially neutral, generally applicable criminal laws do not "burden" religious practice even if they prohibit that practice outright. This holding severely restricts the constitutional protection available to both volitionalist and nonvolitionalist religious beliefs. The remainder of Part I will examine the recent cases in detail to demonstrate that concerns about nonvolitionalist claims lie at the heart of the Court's dramatic reduction in free exercise protection. Part II will argue that such a reduction is unnecessary, unjustified, and an important violation of the promise of religious freedom.

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97 For instance, the Navajo who contested the flooding of Rainbow Bridge Canyon complained about both volitionalist and nonvolitionalist impacts. The nonvolitionalist impact was the religious effect that would flow from the drowning of the gods that lived in that location, regardless of who was responsible for the flooding. The volitionalist impact consisted of the different religious effects that would flow from the Indians' own failure to fulfill certain religious duties because the flooding denied them access. *See supra* notes 11-15 and accompanying text. Thus, in the Navajo religion, some religious effects on a particular individual are caused by his own free choices while others are caused by a more general disruption of the natural order of which he is a part.

98 Wisconsin v. Yoder, 406 U.S. 205 (1972), may be an example of an earlier claim concerning a nonvolitionalist impact. In that case, the Court held that the free exercise clause required the state to grant an exemption to its compulsory education laws to the children of Old Order Amish. However, *Yoder* also involved a straightforward volitionalist interference with choice, so the Court did not explicitly consider the novel claim. *See infra* notes 430-62 and accompanying text.

SECTION TWO.
THE COURT'S DEFINITION OF A "BURDEN" ON FREE EXERCISE: *SHERBERT* AND *BOWEN*

Given the pervasiveness of volitionalist bias in the general culture, it would be surprising if the Supreme Court did not exhibit such a bias as well, especially in its free exercise jurisprudence. The Court may have entertained such notions *sub silentio* for many decades, but over the last several Terms, its volitionalism has become more explicit. In 1986, *Bowen v. Roy*[99] provided the first clear evidence of this bias.

The modern era of free exercise clause jurisprudence began with *Sherbert v. Verner*.[100] In that case, the Court articulated a broad rule that any pressure by the government on a believer to forgo a religious practice constituted a burden on his free exercise of religion. This principle remained the law for over two decades.[101] Then, in *Bowen*, the Court announced a new rule: Not all pressures to forgo religious practices are constitutionally cognizable burdens on religion. In particular, governmental "interual procedures" are never burdens. To determine whether a particular practice is internal or external, the Court asserted that it would use, not the believer's framework, but a framework that, according to the Court, the Constitution itself presupposes.[102] We will argne that this framework is recognizably volitionalist. The Court, in other words, held that the free exercise clause itself contains a volitionalist bias.[103]

A. Background: The Court's Definition of a "Burden": 1963-1986

The Supreme Court has recognized two basic kinds of burdens that a government action may impose on religious rights: burdens on belief and burdens on practice.[104] According to the Court, the Constitution absolutely forbids burdens on belief,[105] but the gov-

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99 476 U.S. 693 (1986).

100 374 U.S. 398 (1963).

101 *See, e.g.* United States v. Lee, 455 U.S. 252, 257 (1982); Thomas v. Review Bd., 450 U.S. 707, 716-17 (1981).

102 *Bowen*, 476 U.S. at 699.

103 We do not suggest that the Court held nonvolitionalist claims to be entirely without constitutional protection, *see infra* note 153, but rather that the full range of protection extends only to volitionalist claims. In this sense, the Court seems to believe that volitionalism is a favored religious belief under the free exercise clause.

104 *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

105 *See id.* The Court has defined a "burden" on belief quite narrowly as comprising only laws targeted at particular beliefs and laws that restrict the expression of beliefs. *See* Sherbert v. Verner, 374 U.S. 398, 402 (1963):

> The door of the Free Exercise Clause stands tightly closed against any

ernment may impose a burden on religious practice if it can demonstrate a compelling state interest in doing so. The Court has divided governmental pressures to forgo religious practice into two categories. Some laws facially discriminate against a particular religion, a group of religions, or religion in general;[106] others are facially neutral toward particular religions and toward all religion, but on application frustrate religious practice.[107] The Court has consistently held that the former category burdens religious practice; from at least 1963 to 1986, the Court believed that the latter category also posed burdens.

In 1963, in *Sherbert v. Verner*,[108] the Supreme Court held that a general secular regulation that was neutral towards religion on its face could nonetheless be unconstitutional if on application it burdened a particular believer's religious conduct. As a result, the Court required the state to accord the burdened believer an exemption from the regulation unless it could demonstrate a compelling state interest in denying one.[109]

In the ensuing years, the Court recognized two primary types of burdens on religious conduct caused by facially neutral, secular regulations. First, a law may directly coerce a believer to violate the dictates of her religion by facially requiring conduct that a religion prohibits or by facially prohibiting conduct that a religion requires.[110] For example, in *Wisconsin v. Yoder*,[111] Amish parents chal-

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> governmental regulation of religious *beliefs* as such. Government may neither compel affirmation of a repugnant belief, nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, nor employ the taxing power to inhibit the dissemination of particular religious views.

Id. (citations omitted).

106 *See* Larson v. Valente, 456 U.S. 228, 244-45 (1982).

107 For example, a law against the use of controlled substances does not facially burden anyone's religious practice, but in operation, the law effectively forbids the celebration of the central sacrament of the Native American Church, which involves the use of peyote. *See* Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595, 1622 (1990).

108 374 U.S. 398 (1963).

109 *Id.* at 403. *Sherbert* may not have been the first case to establish this rule. The Court believes that the rule dates back at least as far as Everson v. Board of Education, 330 U.S. 1 (1947). *See* Thomas v. Review Bd., 450 U.S. 707, 716-17 (1980). Some commentators have disagreed with the Court's view of the age of the *Sherbert* rule, believing that it actually originated with *Sherbert*. *See* John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1313 & n.333; Stephen Pepper, Reynolds, Yoder, *and Beyond: Alternatives for the Free Exercise Clause*, 1981 UTAH L. REV. 309, 311 n.7. The issue is irrelevant for our purposes, because the *Sherbert* rule has been the law at least since *Sherbert* was decided, now over 25 years ago.

110 As we will suggest below, this meaning of "coercion"—requiring or forbidding conduct by law, presumably under threat of state-imposed sanctions—is the one that the Supreme Court has apparently adopted. It is not, however, the only possible meaning of the term. *See infra* text accompanying notes 244-45.

111 406 U.S. 205 (1972).

lenged state laws requiring all children to attend school to the age of sixteen. The attendance law compelled the parents to violate a tenet of their religion, which required them to keep their children at home, free from non-Amish influences, after the age of thirteen. The Court recognized a burden on the parents' free exercise rights[112] and denied the existence of a sufficient state interest to justify the burden. Accordingly, it granted the Amish an exemption from the attendance laws.[113]

The second type of burden occurs when a law compels a believer to choose between receiving government benefits and observing the dictates of her religion.[114] This type of burden differs from the first in that the law does not on its face require or forbid conduct, but simply makes religious observance more expensive or more difficult. Thus, in *Sherbert*, the State of South Carolina granted unemployment compensation to all unemployed persons except those who failed "without good cause . . . to accept available suitable work." The State denied Sherbert compensation because she refused to accept a job that would require her to work on Saturday, the day of her Sabbath. The State maintained that her religious objections to work on that day did not constitute "good cause" for refusing employment.[115]

The Court acknowledged that the law may have only indirectly burdened Sherbert's religious rights, because it did not on its face require her to violate any of the precepts of her religion.[116] None-

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112 *See id.* at 218.

113 The Court in *Yoder* may also have recognized a kind of burden different from either of the two described in text. *See infra* notes 428-539 and accompanying text. Whether or not the *Yoder* Court acknowledged this third type of burden, the opinion clearly recognized facial prohibitions or compulsions as a burden on free exercise: "The impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Yoder*, 406 U.S. at 218.

114 These two burdens to some extent operate in the same way and therefore are really the same kind of burden. It is true that unlike "indirect coercion," "direct coercion" facially forbids a practice rather than simply putting the believer to a choice. Presumably the penalty is designed to prevent the practice and to express public disapproval. But in practice, even "direct coercion" prevents the practice, if at all, ouly by putting the believer to a choice between the proscribed conduct and a penalty of some kind. From the believer's perspective, then, both varieties of burdens are weighted choices; the only difference is the heaviness of the weight.

115 Sherbert v. Verner, 374 U.S. 398, 399-402 (1963). The Court also noted that South Carolina required employers to be closed on Sunday, with the result that the State never subjected Sunday observers to the choice forced upon Mrs. Sherbert. The Court clearly stated, however, that this discriminatory effect was in no way necessary to its holding; even nondiscrininatory burdens imposed by neutral secular regulations can be unconstitutional. *Id.* at 406.

116 Two years before *Sherbert*, in Braunfeld v. Brown, 366 U.S. 599 (1961), the Court held that a Sunday closing law did not burden the religious practice of orthodox Jewish

theless, the Court held that the denial of benefits did, indirectly but unmistakably, burden her religious rights by forcing her

> to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against Appellant for her Saturday worship.[117]

After *Sherbert*, the Court consistently affirmed that both direct coercion by facial prohibition and indirect coercion by a denial of benefits were cognizable burdens on religious liberty.[118] Prior to 1986, however, the Court never indicated that these two types of burdens were the only ones the Constitution recognized. During this time period, the Court had no occasion explicitly to decide whether other kinds of pressures on believers to cease a religious practice might also qualify as burdens on free exercise, because it entertained cases involving only the two types of "standard" burdens.[119] But until 1986, the answer seemed implicit in the Court's rationale for its holding in *Sherbert*. The state could not put a believer to a choice between benefits and religious observance because it would thereby pressure the believer to take the benefits and forgo the practice.[120] In other words, as the Court has repeatedly reaf-

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merchants. The merchants were forced by law to close on Sunday and by religion to close on Saturday, thus losing two full business days. The Court acknowledged that the law would force the merchants to make "some financial sacrifice in order to observe their religious beliefs" but still held that the law did not create a cognizable burden because the law "imposes an indirect burden, . . . *i.e.*, [it] does not make unlawful the religious practice itself," but merely "regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive." *Id.* at 605-06. The decision in *Braunfeld* thus seems in direct contradiction to the language of *Sherbert*; in the latter case the Court recoguized a burden even though, by the Court's own admission, the burden was only an "indirect result" of the unemployment law and "no criminal sanctions directly compel[led] appellant to work a six-day week." *Sherbert*, 374 U.S. at 403. *Sherbert* did not, however, overrule *Braunfeld*. Rather, perhaps disingenuously, the Court reinterpreted the holding of that case. According to the 1963 Court, the 1961 Court had recoguized a burden but had found it outweighed by "a strong state interest in providing one uniform day of rest for all workers." *Id.* at 408. We may thus assume that the *Sherbert* Court would have recoguized a burden on the facts of *Braunfeld*.

117 *Sherbert*, 374 U.S. at 404.

118 *See, e.g.* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141 (1987); United States v. Lee, 455 U.S. 252, 256-57 (1982); Thomas v. Review Bd., 450 U.S. 708, 716-17 (1981); Johnson v. Robison, 415 U.S. 361, 384-85 (1974); Wisconsin v. Yoder, 406 U.S. 205, 218 (1972); Gillette v. United States, 401 U.S. 437, 462 (1971).

119 *See Lee*, 455 U.S. at 256-58 (facial compulsion); *Thomas*, 450 U.S. at 717-18 (denial of benefits); *Johnson*, 415 U.S. at 383-85 (denial of benefits); *Gillette*, 401 U.S. at 462 (facial compulsion). The only possible occasion that the Court might have had to rule on a different kind of burden was in *Yoder*. *See infra* notes 430-49 and accompanying text.

120 *See Sherbert*, 374 U.S. at 404.

firmed, *Sherbert* rests on the broad principle that even facially neutral regulations that in application pressure believers to give up religious conduct are for that reason unconstitutional as applied.[121] Facial prohibitions or compulsions and denials of benefits are two examples of such pressures, but they do not exhaust the class—or so it seemed.

B. The Holding of *Bowen v. Roy*

Then, in *Bowen v. Roy*,[122] an almost unanimous Court[123] repudiated this broad principle and announced instead that only certain, obscurely defined kinds of pressures would qualify as free exercise burdens. Stephen Roy is an Abenaki Indian who believes that the use, by himself or by government, of a social security number assigued to his daughter, Little Bird of the Snow, will rob her of spiritual power.[124] He therefore brought a free exercise challenge to federal laws requiring the use of social security numbers in state administration of federal welfare programs.[125]

Roy objected to two features of these laws. First, he challenged the federal requirement that each applicant for welfare benefits must submit a social security number to the state agency in order to receive the benefits. This claim alleged a straightforward *Sherbert*-style burden: the requirement forced Roy to choose between violating the dictates of his religion, by submitting the number, and receiving federal benefits. However, the Court divided on which constitutional standard it should apply to this claim. Three mem-

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121 *See, e.g.*, *Hobbie*, 480 U.S. at 141:

> [w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, *or where it denies such a benefit because of conduct mandated by a religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs*, a burden upon religion exists.

(quoting *Thomas*, 450 U.S. at 717-18) (emphasis added by *Hobbie* Court).

122 476 U.S. 693 (1986).

123 Justice White was the sole dissenter. *Id.* at 733.

124 Roy believes that because the social security number applies uniquely to Little Bird of the Snow, its use by someone else could deprive her of her ability to control her own personality and to ward off spiritual evil. Joint Appendix at 85, 109, 467-68, Bowen v. Roy, 476 U.S. 693 (1986) (No. 84-780) [hereinafter Joint Appendix]. More particularly, Roy believes that the number is part of the "great evil" Katahdin, which he identifies with the use of computers and nuclear weapons, because the social security number is the "most widely shared number in the computers." *Id.* at 86-87. Use of such numbers robs the spirit of individuals, a process Roy compared to the psychological process of "dehumanization." *Id.* at 87. Similar beliefs are not uncommon. Many groups insist that the "real" names of individuals be kept secret, because, as unique identifiers, they could be used for evil purposes to control the person named. *See, e.g.*, CLAUDE LEVI-STRAUSS, A WORLD ON THE WANE 270-71 (1961).

125 *Bowen*, 476 U.S. at 695-99.

bers of the Court proposed a new standard:[126] Neutral regulations that incidentally burden religious practice need be only a reasonable means of promoting a legitimate public interest.[127] Last Term, this standard gained a majority on the Court, but in *Bowen* four members of the Court indicated their continuing support for the *Sherbert* standard.[128] The two remaining Justices, Blackmun and Stevens, declined to reach this claim, finding it nonjusticiable.[129] As a result of this odd configuration, the Court remanded the case without a clear holding on Roy's request for an exemption from the requirement that he submit a social security number to receive benefits.

The Court's treatment of Roy's other claim did command a majority, but is perhaps even more confusing.[130] Federal law requires that not only welfare recipients but also state agencies use social security numbers in administering certain federally funded programs.[131] Roy believed that the state's use of the number, no less than his own, would rob his daughter of spiritual power.[132] Therefore, he sought an injunction forbidding the state to use her social security number. The Court did not question the sincerity or relig-

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126 The three members of the Court who supported this standard—Chief Justice Burger, joined by Justices Powell and Rehnquist—attempted to argue that *Sherbert* and its progeny require application of the compelling state interest standard only in cases where the statute at issue provides for individualized consideration. If the state denies the exemption after such consideration, the denial is evidence of discriminatory intent, which calls forth the highest standard of review. *Id.* at 707-08. *Sherbert* applied its standard of review not because of evidence of discriminatory intent, but because of the law's burden on religious practice. *See supra* notes 114-21 and accompanying text. A majority of the Court has since so construed *Sherbert*. *See* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 140 (1987); *see also* Note, *The "Core"-"Periphery" Dichotomy in First Amendment Free Exercise Clause Doctrine:* Goldman v. Weinberger, Bowen v. Roy, *and* O'Lone v. Estate of Shabazz, 72 CORNELL L. REV. 827, 849-50 (1987) (authored by Marc J. Bloostein) (arguing that Chief Justice Burger failed to distinguish *Sherbert* and *Thomas* from *Roy*).

127 *Bowen*, 476 U.S. at 707-08 (pointing to a growing willingness on the part of the Court to use rational-basis analysis on "peripheral" free exercise cases: those cases which arise either outside the political community or involve nondiscriminatory restrictions on government benefits).

128 Justice O'Connor expressed this view in an opinion which Justices Brennan and Marshall joined. *Id.* at 726-31. Justice White wrote a separate opinion in which he asserted that *Sherbert* required allowance of both of Roy's claims. *Id.* at 733. As White dissented in *Sherbert*, he perhaps intended his *Bowen* opinion as irony. He may have intended his assertion that *Sherbert* requires granting both of Roy's claims to suggest that *Sherbert* was incorrect from the beginning because it required the Court to go to ridiculous lengths to accommodate religion.

129 *Id.* at 713 (Blackmun, J., finding the record incomplete); *id.* at 718-23 (Stevens, J., finding the case either moot or not ripe). Justice Blackmun did indicate in dicta his continued support for the *Sherbert* ruling and his belief that it would require an exemption for Roy if the case were justiciable. *Id.* at 715-16.

130 From this point forward, our references to Roy's claim or Roy's challenge are to this second claim.

131 *See* 42 U.S.C. § 602(a)(25) (1988).

132 *See* Joint Appendix, *supra* note 124, at 467-79.

iousness of Roy's beliefs.[133] The Court considered only whether the government's use of the number represented a constitutionally cognizable burden on free exercise rights. Eight Justices concluded that it did not. The Court explained that the free exercise clause distinguishes between individual religious activity, such as celebrating the Sabbath, and internal governmental conduct, such as the use of certain filing cabinets. The clause protects the former but in no way affects the latter. In the Court's words,

> The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens. . . .
>
> . . . The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures.[134]

Since government use of a social security number is an internal matter, Roy's second claim alleged no burden on his religious rights.

The Court did acknowledge that, from Roy's perspective, "internal government procedures" may have some definite external effects. Indeed, the Court conceded that state use of the number may have as grave an impact on Little Bird of the Snow as Roy's use of it. The Court maintained nonetheless that burdens are to be assessed not from the standpoint of the believer, but from the standpoint of the Constitution itself:

> Roy's religious views may not accept this distinction between individual and governmental conduct . . . . It is clear, however, that the Free Exercise Clause, and the Constitution generally, recognize such a distinction; for the adjudication of a constitutional claim, the Constitution, rather than an individual's religion, must supply the frame of reference.[135]

Although the Court distinguished "internal" and "external" government conduct from the perspective of a posited constitutional "frame of reference," it neither explained the exact content of this "frame of reference" nor how the Justices derived it from the document.

The Court offered only three observations, none of them very useful, on the subject. First, it insisted that the free exercise clause "simply cannot be [otherwise] understood."[136] Second, the Court argued that the clause is "written in terms of what the Government cannot do to the individual, not in terms of what the individual can

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133 *See Bowen*, 476 U.S. at 696.
134 *Id.* at 699-700.
135 *Id.* at 701 n.6.
136 *Id.* at 699.

extract from the Government."[137] By this standard, claims would involve internal conduct whenever they seek to extract something from the government. This explanation is at best incomplete because it fails to distinguish Roy's claim from Sherbert's. Sherbert, no less than Roy, sought to extract something from the government; she sought to "extract" unemployment benefits, even though she was not willing to work on Saturday. Therefore, in the *Bowen* Court's view, the fact that a claimant seeks something from the government cannot alone be enough to render the claim uncognizable.[138]

Third, and perhaps most significantly, the Court indicated that the meaning and constitutional roots of the distinction between internal and external conduct were just too intuitively apparent to require much explanation. In this vein, the Court offered a parade-of-horribles argnment, the first in a series that the Court would utilize in later cases. According to the Court, recognizing Roy's claim would lead to the accommodation of hypothetical religious beliefs that are unacceptably bizarre: "Roy may no more prevail on his religious objection to the Government's use of a Social Security number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets."[139]

Unfortunately, the Court felt no need to analyze this intuitive distinction between internal and external conduct, which is neither clear nor unproblematic. As we will argue in the next subsection, upon close analysis, the distinction seems to rest on the idea that the Constitution itself adopts a volitionalist orthodoxy.

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137 *Id.* at 700.

138 Ironically, the *Bowen* Court draws its language on this point from Justice Douglas's concurring opinion in *Sherbert*, which in context makes precisely this point. Douglas asserts that the believer may not extract money from the government, "the better to exercise" her "religious scruples." *Sherbert*, 374 U.S. at 412. In this sense, the first amendment does not give the believer the right to extract benefits from the government for the purpose of subsidizing her religious practice. But if a believer is "otherwise qualified for unemployment benefits, payments will be made to her not as a Seventh-day Adventist, but as an unemployed worker." *Id.* Under these circumstances, the believer certainly can "extract" something from the government.

139 *Bowen*, 476 U.S. at 700. The other opinions in *Bowen* offered no further enlightenment on this distinction between internal and external conduct. The Justices who concurred in this part of the holding perfunctorily indicated their agreement with the Court's reasoning while adding nothing of importance to the analysis. *See id.* at 713 (opinion of Blackmun, J.); *id.* at 719-20 (opinion of Stevens, J.); *id.* at 724 (opinion of O'Connor, J.). Nor did Justice White, who dissented on this point and would have granted the request exemption, explain why he found the distinction unsound. Dissenting from the Court's treatment of both claims, his entire opinion reads: "Being of the view that *Thomas v. Review* [*Board*], 450 U.S. 707 (1981) and *Sherbert v. Verner*, 374 U.S. 398 (1963), control this case, I cannot join the Court's opinion and judgment." *Id.* at 733 (White, J., dissenting).

C. Making Sense of *Bowen*'s Holding

Since the Court never explains the difference between internal and external government conduct, we must attempt to understand it by inference. To conduct this analysis, we will try to discern why the Court saw a difference between the government actions in *Sherbert* and in *Bowen*. *Sherbert*, by the Court's own admission, involved external limits on individual conduct; the internal government conduct in *Bowen* must therefore differ from the government actions in *Sherbert* in some constitutionally significant way.[140] In the first sub-subsection below, we will consider and reject the possibility that the difference between the two cases might lie in the practical effects on the believer and the government. In the second sub-subsection, we will suggest that the Court relies on a different, and real, distinction between the two cases: Sherbert's claim was volitional and Bowen's claim was not.

1. *Practical Effects: An Inadequate Reconciliation*

A broad interpretation of *Sherbert* would have required the Court to recognize the state's use of the social security number as a burden on Roy's religious practice. Although *Sherbert* involved only a particular kind of burden, a choice between benefits and a religious practice, the holding seemed much broader: whenever state action places substantial pressure on a believer to forgo religious practices, that pressure is a burden on free exercise rights. In *Bowen*, the federal law requiring states to use social security numbers posed such a burden because it pressured Roy and his daughter into forgoing the religious activities and experiences associated with Little Bird of the Snow's ripening spiritual development.[141]

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140 After last Term, *Sherbert*'s actual holding may be of limited viability. *See supra* notes 122-29 and accompanying text. That fact, however, does not affect the utility of using *Sherbert* to understand *Bowen*, since the *Bowen* Court believed that *Sherbert* involved external limits and Roy's claim did not.

141 In particular, Mr. Roy testified that use of the social security number would prohibit him from preparing his daughter for greater spiritual power, *see* Joint Appendix, *supra* note 124, at 467-68, and that without this preparation, Little Bird of the Snow would not be able to protect herself against evil, *id.* at 85, to heal or to see into the future, *id.* at 73-74.

Even if *Sherbert* is rightly read to proscribe only one kind of burden, requiring the believer to choose between benefits and religious practices, the federal law required Roy to make precisely such a choice. He could apply for benefits and suffer the spiritual consequences of the state's use of the number, or he could withdraw Little Bird of the Snow from the AFDC program and thus provide the state government no reason to use her number. Justice Blackmun recognized that Roy faced this choice, *Bowen*, 476 U.S. at 713, but cursorily rejected the contention that it burdened Roy's rights: "[F]or the reasons stated in Part II of the Court's opinion, . . . it stretches the Free Exercise Clause too far." *Id.* The other Justices did not even recognize the existence of this choice. We argue below that the Justices were correct to omit reference to this choice, because the

The Court, however, maintained that there is an important difference between the two cases. South Carolina's unemployment compensation law was an "external" regulation of individual behavior, but the government's use of a social security number was somehow "internal" government activity without cognizable effects on individual conduct. This distinction seems to refer to two sorts of practical effects: the effect of the government action on the claimant and the effect of the claim on the government's own activities. First, the Court may mean that as a practical matter, the government action in *Bowen* does not limit individual activity, while in *Sherbert* the government did impose such a limit. Second, the Court may mean that Sherbert's claim did not request the government to modify its internal procedures, but Roy's did.

Neither of these characterizations is accurate. The federal law in *Bowen* placed quite substantial limits on the activity of the Roy family. As a result of the state's use of the number, Little Bird of the Snow will lose the ability to ward off evil, to see into the future, or to heal.[142] Just as the state unemployment law effectively forced Sherbert to forgo her Sabbath, the law in *Bowen* forced Little Bird of the Snow also to forgo many of her religious practices.[143] Similarly, Sherbert demanded as much modification of internal government conduct as Roy. Like Roy's, Sherbert's demand would significantly effect the state government's administration of one of its programs. The recognition of her exemption claim required the state to take

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existence of the choice was not central to Roy's claim, from Roy's own "frame of reference." But the Court, having rejected that frame of reference, could not legitimately ignore the existence of the choice.

142 *See supra* notes 124, 141. Similarly, the state's use of the number seems to have limited Roy's own religious practice, in that he cannot prepare his daughter for a rich spiritual life. *See supra* note 124.

143 At one point in the opinion, the Court seems to deny that the state's use of the number will in any way limit religious conduct:

> Roy objects to the statutory requirement . . . not because it places any restriction on what he may believe or what he may do, but because he believes the use of the number may harm his daughter's spirit. . . .
>
> . . . .
>
> . . . The Federal Government's use of a Social Security number for Little Bird of the Snow does not itself in any degree impair Roy's 'freedom to believe, express, and exercise' his religion.

Bowen, 476 U.S. at 699, 700-01 (quoting 42 U.S.C. § 1996, which sets forth a general policy of protecting American Indian religions). If this statement means that the state's use of the number will not effectively limit Roy's or his daughter's religious practice, the claim is plainly false, as the text shows. The Court seems to have meant something different: having made the quoted statement, the Court conceded in a footnote that in Roy's "frame of reference" this distinction between individual and government conduct may not make sense. However, the Court measures burdens not from the believer's frame of reference but from the constitutional frame of reference. *Id.* at 701 n.6. In other words, even if the state's use of the number does in practical ways limit Roy's religious practice, that limit is not constitutionally cognizable.

whatever internal steps were necessary to ensure that Sabbatarians need not demonstrate readiness to work on Saturday. The government would have to flag and document Sabbatarians' files and establish investigative procedures. Little Bird of the Snow's request might require more elaborate changes in internal procedure,[144] but that is merely a difference in the degree of "internal" change, not in the kind of effect on the government's activities.[145]

Thus, the difference between the two cases, between "internal" and "external" government conduct, cannot lie in any difference in the practical effects on the government or on the believer. Rather, the Court must mean that even if Roy suffered some practical effect, that effect is for some reason not constitutionally relevant. Further, even if the government suffered some internal effect in *Sherbert*, that effect is similarly irrelevant. The key to the internal/external distinction must lie not in practical effects but in the constitutional "frame of reference" that deems some practical effects irrelevant. Again, however, the Court never explicitly defines this frame of reference. In the next sub-subsection, we will attempt to infer its content based on hints supplied by the Court.

2. Bowen's *Volitionalist Meaning*

a. *Individualism.*

The real difference between the government activity in the two cases, as the Court sees it, can be glimpsed in the Court's assertion that "internal" governmental conduct had external effects on individual activity only in Roy's own religious frame of reference. In other words, Little Bird of the Snow suffered limits on her religious practice only because she ascribed a direct, inherent religious effect—her loss of spiritual power—to governmental activity. The government's own use of a social security number could place a limit on individual activity. But only from the perspective of one who believes that government conduct has such inherent, immedi-

144 It actually is not clear that Roy's claim would cause more internal changes than Sherbert's. Although the changes in bookkeeping required to accommodate Little Bird of the Snow might have been extensive, there are presumably many more Sabbatarians than Abenaki Indians who believe that social security numbers will rob them of spiritual power. In addition, Sherbert's claim required the government to pay out benefits to a recipient to whom the government believed benefits were not due. By contrast, the government conceded that Roy was due benefits; he wanted only to use certain procedures in administering payment. Of the two, Sherbert's claim was likely the more costly to the government.

145 In a related vein, the *Bowen* Court at one point suggested that the two cases differ because Sherbert asked only to be left alone, whereas Mr. Roy wanted to "extract" something from the government. *Bowen*, 476 U.S. at 699-700. As we argued above, this distinction is untenable because both Roy and Sherbert wanted to extract something from the government. *See supra* note 138 and accompanying text.

ate religious significance could the government's own use of a social security number place such a limit on individual activity. From the believer's point of view, the government action was "external" because it caused this ascribed religious effect. From everyone else's, however, it was merely internal. We might diagram this causal relationship as follows: Government Regulation (use of social security number)—> Religious Effect (Loss of Spiritual Power)—> Limits on Individual Activity.

The Court's language supports the interpretation that direct, inherent religious effects ascribed to the government's conduct do not create coguizable burdens on religion in a number of ways. First, the Court insisted that the government's use of the social security number is an external action only in Roy's religious frame of reference.[146] One who did not share this view could not perceive that the government caused any limit on individual conduct. Thus, finding external significance in the government's action depends on some causal effect of the government action that no one but a believer can discern. Similarly, the Court asserted that free exercise claimants "may not demand that the Government *join in* their chosen religious practices by refraining from using a number to identify their daughter."[147] "Join in" seems to be the critical but ambiguous phrase in this sentence. "Join in" cannot mean "support"; Roy requested the government to support his religion no more than did Sherbert. Nor can "join in" mean "endorse" or "adopt." Roy in no way required the government to believe in the truth of his religious beliefs.

The sense in which Roy requested the government to "join in" his practices must be that he ascribed a direct religious effect to the government action. The government therefore became a direct participant in the spiritual realm. Indeed, the Court opened its discussion of Roy's claim by flatly stating: "Never to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family."[148] In other words, the Court would not recognize any belief that government's actions have direct religious effects for the believer. The government, by itself, simply cannot create religious significance.

The external effects that Bowen asserted and the Court denied may be called "ascriptive effects" because the believer ascribes inherent religious significance to government actions. In *Sherbert*, by contrast, the government action had "non-ascriptive" effects—limits

146 *See Bowen*, 476 U.S. at 701 n.6.
147 *Id.* at 700 (emphasis added).
148 *Id.* at 699 (emphasis in original).

on individual behavior that did not arise as a result of direct religious effects ascribed by the believer to government action.[149] Sherbert concluded that the government's conditioning of welfare benefits would limit her religious practice for the rather obvious, nonreligious reason that she needed or wanted the money. This "external" limit on individual behavior could be widely and generally perceived; it was not part of an idiosyncratic ascription of significance by the believer. We may diagram this causal sequence thus: Government Regnlation—> Limits on Individual Activity.

This internal/external distinction is therefore based on the premise that the Constitution recognizes only a certain category of religious effects. Roy and Sherbert complained about religious harms with very different origins. Roy complained of a religious harm directly and intrinsically caused by the government action (loss of spiritual power), and that harm was the cause, not the result, of limits on individual action. Those limits on individual action in turn may have caused secondary harms because of Little Bird of the Snow's inability to engage in important behaviors. But the principal religious harm is the direct result of government activity, not individual activity. The recognition of all secondary harms depends on the recognition of this primary harm. The complete *Bowen* claim might thus be diagrammed: Government Regulation—> Primary Religious Effect—> Limits on Individual Activity—> Secondary Religious Effects.

In *Sherbert*, by contrast, the plaintiff complained of a religious harm directly and intrinsically caused by the individual's behavior (failure to observe the Sabbath) and only mediately by the government activity. The religious harm was the result, not the cause, of limits on individual activity. The government regnlation did cause religious harms, but only indirectly, through pressure on an individual to behave in a given way. The *Sherbert* claim might thus be diagrammed: Government Regulation—> Limits on Individual Activity—> Religious Effects. The threatened religious harms in such a claim are all directly the results of the individual's failure to perform or not to perform a certain act, not of government action.[150]

These diagrams highlight the central feature of the Court's distinction between internal governmental conduct and external regulation of individual behavior. In *Sherbert*, the cognizable religious harm to the individual was the direct result of the individual's be-

149 *See supra* note 92.

150 In *Sherbert* the religious effects were not inevitable, and the limits on individual activity not absolute, because Sherbert could have refused the benefits, as she did. In this sense, the complete claim might be diagrammed: Government Regulation —> Limits on Individual Activity —> Religious Effects OR Loss of Benefits.

havior; in *Bowen*, the noncognizable religious harm was the direct result of governmental behavior. In other words, the Constitution recognizes only those religious harms that directly result from a particular individual's activity; the Constitution denies that other events in the universe can have cognizable religious consequences for that individual.[151]

As a corollary of this position, the Court will recognize only those limits on individual behavior that result "non-ascriptively" from government regulation.[152] *Bowen* did involve limits on individual activity, and indeed those limits, in turn, produced harmful religious effects. But these limits on individual conduct result from intrinsic religious effects that Roy ascribed to government action. Since these intrinsic religious effects are not constitutionally cognizable, neither are the limits on individual behavior that flow from them.

Thus, the *Bowen* Court recognized only a certain category of religious claims—claims that might, in a loose sense, be called individualistic. Only claims that take the following form are constitutionally cognizable: my religion demands that I act or not act in a given way; I must be free so to act or not act, because if I deviate from these demands I will suffer negative religious consequences; but I will not suffer negative religious consequences for any other reason, such as the intrinsic religious significance of government activity.[153] This form of claim is based on a particular view of religious activity that individual action alone valorizes the religious world of the individual, or at least that part of the religious world that is con-

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151 The conclusion that only individual activity can have religious effects follows necessarily from the conclusion that government regulation cannot. All free exercise practice claims must assert that government regulation limits a believer's conduct. But according to the Court, since a government regulation cannot itself generate direct religious effects, it cannot create limits on individuals by means of a religious effect. In the causal diagram, no religious effect can intervene between the terms "Government Regulation" and "Limits on Individual Activity." Thus, the basis for any free exercise claim must be that the government is "non-ascriptively" limiting individual behavior: Government Regulation —> Limits on Individual Activity. Since religious effect cannot precede a limit on individual activity, it can only follow individual activity in the causal sequence. As a result, in the universe of possible free exercise claims, only individual activity, and not government regulation, can have religious effects.

152 The two kinds of burdens that the Court recognized—prohibitions and weighted choices—make sense in at least some individualist frameworks. *See infra* text accompanying notes 167-76.

153 The *Bowen* Court may not have intended to exclude nonindividualist claims from all protection. *Bowen* concerned only burdens on practice resulting from facially neutral laws. *See* Bowen v. Roy, 476 U.S. 693, 699-700 (1986). Thus, the Court might have recoguized nonvolitionalist belief claims or claims that a law facially or intentionally discriminated against a nonvolitionalist religion. Under *Bowen*, then, volitionalist claims are not the exclusive inhabitants of the free exercise clause's shelter, but they are clearly the favored inhabitants.

stitutionally cognizable. I am responsible, I am to suffer, only for my own actions. Accordingly, we will call this model of religious behavior an individualist model.[154]

b. *Volitionalism.*

Volitionalism is a subcategory of individualism. While individualism's general premise is that the individual may legitimately suffer only as a result of her own behavior, volitionalism maintains more specifically that she may suffer only from her own behavior for a particular reason: she has the capacity to exercise free and self-determining choice, yet has failed to exercise this capacity so as to live up to her obligations. The critical religious activity is not just individual behavior, but individual behavior that is the result of free individual choices[155] informed by conscience, the central religious faculty.[156] Stephen Roy's claim was nonvolitionalist: Little Bird of the Snow would suffer loss of spiritual power not because of any failure on her part to exercise her will, but simply because some other person possessed a unique numerical identifier that would give him power over her.

The *Bowen* Court's distinction between "internal" and "exter-

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154 The Court's adherence to this model may help to explain the majority's studied neglect of the choice that Roy actually faced. Roy could have prevented the government from using the number by not applying for benefits at all. On the face of things, the statutory scheme thus presented a classic *Sherbert*-style burden. Roy was forced to choose between forgoing government benefits and bringing religious harm upon bimself. Except for Justice Blackmun, however, the Court entirely ignored the existence of this choice. The Justices' individualist bias offers one reason. Although Roy could have chosen to avert the harm, his claim was still nonindividualist. Roy ascribed religious significance to the state's use of the number not because he had a choice in the matter, but simply because the government's action had inherent religious meaning. That Roy had some choice in the matter is wholly coincidental; his application for benefits is an occasion for harm but not the reason for it. His claim is essentially nonindividualist because he suffers harm as a result, not of his own, but of the government's actions. The Court may thus have found itself in a dilemma. On the one hand, Roy's case presented the Court with a *Sherbert*-style choice long recognized as a burden; on the other hand, the Justices' individualist "frame of reference" would reject the burden as nonindividualist in nature. The Court could have openly avowed that *Sherbert* ought to be confined to individualist claims, but such an avowal, perhaps, would have made the Court's substantive bias too apparent. So the Court selected the easiest solution to its dilemma by simply ignoring the existence of the choice Roy faced.

155 Not all individualist models are volitionalist. A belief system may maintain that individuals suffer religious consequences only for their own actions, but not because those actions are the result of undetermined choices. The religion may even deny that the believer has any choice in the matter. Although such religions are logically possible, they are extremely uncommon in western democracies today because of the pervasive influence of liberal ideas enshrining individual responsibility and tying it to undetermined choice. *See supra* notes 1-10 and accompanying text.

156 This definition of conscience is based on what we suspect is the most common use of that word. A person suffers from a guilty conscience when she has failed in her moral obligations and knows that she could have done better.

nal" government practices rested not merely on a general individualist paradigm but more specifically on a volitionalist paradigm.[157] The Court implicitly revealed its adherence to a volitionalist view of the religious self in four significant ways. First, the *Bowen* Court assumed that its view of the proper reach of religious freedom is self-evident and commonplace, and that any other view savors of the bizarre; ascribing religious significance to the government's use of a social security number is as odd and outrageous as ascribing religious significance to the color of the government's file cabinets. The volitional model of the self is the most commonplace and self-evident model in American society.[158] In this culture, to say that one is an individualist is virtually to say that one is a volitionalist. Although nonvolitional individualist religious practices are theoretically possible, they are extremely rare in modern America.[159] To the vast majority of modern Americans, individualism and volitionalism go hand in hand: individuals are responsible only for their own actions *because* one can exercise free choice only over one's actions.

Second, the Court's langnage in the exemption cases exhibits the apparent assumption that paradigm free exercise claims are claims of conscience, in which the individual must exercise her free will to fulfill a religious obligation. Thus, the Court recognized Sherbert's claim of "conscientious objection to Saturday work . . . prompted by religious principles";[160] Thomas's claim that he "could not work on weapons without violating the principles of his religion";[161] and the claim of the Old Order Amish that in light of "a religiously based obligation" to care for their elderly, they could neither accept social security benefits nor pay social security taxes.[162] This langnage suggests that paradigmatic religious activity is volitional: individuals have the choice to obey or disobey the demands of conscience, and their religious fate is determined by making the right choice.[163]

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157 Actually, little turns on whether the Court's bias is generally individualist or more narrowly volitionalist because either bias is inconsistent with the underpinnings of the free exercise clause and meaningful religious liberty. Neither courts nor legislatures should be free to subject either nonindividualist or nonvolitionalist religions to discriminatory treatment.

158 *See supra* text accompanying notes 17-65.

159 *See supra* note 155.

160 Sherbert v. Verner, 374 U.S. 398, 403 (1963).

161 Thomas v. Review Bd., 450 U.S. 707, 710 (1981).

162 United States v. Lee, 455 U.S. 252, 257 (1982).

163 Some commentators have criticized the Court's unduly restrictive focus on claims of conscience. *See* Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 YALE L.J. 350, 357 (1980). Others have defended a focus on protecting the religious person—clearly recognizable as a volitionalist—from being forced to violate his conscience. *See* J. Morris Clark, *Guidelines for the Free Exercise Clause*,

Third, the *Bowen* Court revealed its volitionalist bias by recognizing only those kinds of burdens on religious practice that fit most comfortably in a volitionalist belief scheme. The Court recognized only two particular kinds of burdens: laws that facially compel a believer to act contrary to her religion, and laws that require the believer to choose between religious practice, government rights, benefits, or privileges. More recently, in *Lyng v. Northwest Cemetery Protective Association*, the Court definitively construed *Bowen* as holding that only these two types of pressures qualify as burdens under the free exercise clause.[164] The former *Lyng* describes as "direct coercion";[165] and the latter as "indirect coercion."[166] "Direct coercion," as defined by the Court, makes sense in either a volitionalist or nonvolitionalist individualist framework. "Indirect coercion," however, is best understood in a volitionalist context because such a burden involves pressure on the believer to make the wrong choice.

"Direct coercion" comports with any individualist system of belief. A law that "directly coerces" conduct is one that facially prohibits religious conduct or one that facially requires religiously prohibited conduct.[167] Direct coercion burdens volitionalist religious practice because it prevents the believer from fulfilling religious obligations. In some pure volitionalist systems, "direct coercion" may not appear to be a burden at all because the religion requires only a will to effect the given end. Therefore, "impossibility" because of a coercive law is considered an excuse. In these circumstances, some commentators have suggested that no burden exists.[168] However, the situation is rarely this simple, because even in a case of direct coercion, the believer still has it within his power

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83 HARV. L. REV. 327, 337-38 (1969) ("[T]he cost to a principled individual of failing to do his moral duty is generally severe, in terms of supernatural sanction or the loss of moral self-respect."). Professor Choper would restrict the constitutional definition of religion to those faiths that threaten "extratemporal consequences" for violations of behavioral rules because "the commands of religious belief . . . have a unique significance for the believer, thus making it particularly cruel for the government to require the believer to choose between violating those commands and suffering meaningful temporal disabilities." Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 597-99.

164 *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 448 (1988).

165 *Lyng* describes "direct coercion" burdens as "outright prohibitions," laws that facially proscribe conduct inconsistent with religious belief. *Id.* at 450.

166 *Lyng* describes "indirect coercion" as governmental actions that "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Id.* at 449. Such indirect coercion is not regarded as an outright prohibition but simply a penalty. *Id.* at 450. The believer must choose between forgoing the practice and incurring the penalty.

167 *See supra* note 165.

168 *See, e.g.*, Clark, *supra* note 163, at 347-48.

to effect the end: she can go to jail or pay the fine.[169] From the believer's perspective, therefore, direct coercion poses the same kind of dilemma as indirect coercion: the law puts the believer to a weighted choice, forcing on her a crisis of conscience.[170]

A volitionalist would thus recognize "direct coercion" as a burden on religious practice. A nonvolitionalist individualist, however, would also recognize such a burden. Nonvolitionalist individualist religions maintain that only individual actions, but not acts of will, can create religious significance. Laws that facially forbid or require conduct pose a threat to these religions, not because they tempt the believer's will, but because the laws directly regulate individual conduct, with resultant religious effects.[171] Not all "direct coercion" laws actually prevent conduct. The believer may simply be compelled to choose between incurring a penalty and forgoing the religious practice. The goal of these laws is, however, to affect conduct, not simply to require the believer to make a choice. If the threat of penalty does not prevent the conduct, the law has failed.[172]

Thus, *Bowen*'s recognition of burdens that "directly coerce" the believer comports with any individualist religious framework. By contrast, the Court's description of "indirect coercion" fits best with a volitionalist model of religious behavior. These burdens are not designed to prevent certain religious conduct but merely to make the believer choose between government benefits and religious practice. Therefore, if the believer chooses religious practice over benefits, the law has in no sense failed to achieve its goal, because the goal was not to forbid the practice but merely to require a

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169 In *Yoder*, for example, the State threatened imposition of a five-dollar fine, not actual physical coercion. *See* Wisconsin v. Yoder, 406 U.S. 205, 208 (1972).

170 However, we do not suggest that absent a choice, if the government were to render a practice impossible by physically preventing it rather than by punishing it, volitionalists would recognize no burden. A government could completely eradicate the practice of any and all volitionalist behaviors by the cumulative effect of a series of such preventions. The individual would find no immediate consequence for herself in any of the separate burdens, because she retains the defense of impossibility. In the aggregate, however, the government measures would eliminate her religion as a phenomenon. This explanation may help account for the tendency of courts to recognize a burden when states force Jehovah's Witnesses to take blood transfusions, even though the religion may consider impossibility to be a genuine excuse.

171 To illustrate: a religion might ascribe beneficial religious effects to its adherents' use of certain drugs. A volitionalist religion would require the believer to exercise her free will to use such drugs. If the state were to criminalize use of such drugs, the volitionalist would be faced with a weighted choice between using drugs and going to jail. The harm occurs in tempting the believer to stray from her obligations. A nonvolitionalist individualist religion, on the other hand, would find religious significance in whether the believer actually used the drugs, not in the strength of his will in adherence to his religious conscience.

172 Even if the goal of these laws were not prevention, they might still burden nonvolitionalist religions simply by making the practice of the religion costlier.

choice. The Court's concern in these cases is not that the state attempted to forbid religious practice, but that it compelled the believer to make a "cruel choice,"[173] tempting him from his religious dedication.[174] As a result, *Sherbert* condemns government action that "forces [a believer] to choose between" benefits and religious practice;[175] *Thomas* condemns these choices because they place "substantial pressure on an adherent to modify his behavior and to violate his beliefs."[176] In its condemnation of such choices, the Court's concern seems to be for the conscientious believer struggling to live up to the obligations placed on him by his religion; the evil in such burdens is that they tempt the believer away from the right path by weighting the choice against the straight and narrow.

In essence, then, the *Bowen* Court indicated its volitionalist bias by recognizing burdens that only make sense in light of a volitionalist theory of the religious agent. Since the Court believes that the Constitution adopts a unitary "frame of reference" for measuring burdens, we may infer that, in the Court's view, the Constitution is volitionalist.

Finally, the Court offered evidence of its volitionalism in its suggestion that the free exercise clause shares the same "frame of reference" as the "Constitution generally."[177] This constitutional "frame of reference" distinguishes between government actions

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173 Braunfeld v. Brown, 366 U.S. 599, 616 (Stewart, J., dissenting), *reh'g denied*, 368 U.S. 869 (1961).

174 "Indirect coercion" not only imposes a cruel choice on the believer, such penalties to the exercise of religion also make the practice of the religion more costly. For example, the Court in *Sherbert* analogized this choice to "a fine imposed against [her] for . . . Saturday worship." Sherbert v. Verner, 374 U.S. 398, 404 (1963). Unlike the "cruel choice" burden, this "extra cost" burden makes sense in a nonvolitionalist individualist religion, because the focus is not on the will required to hew to the correct path, but on the additional cost extracted for religious practice. Formally, then, recognition of such burdens is consistent with nonvolitionalist individualism.

A closer consideration of the Court's treatment of "indirect" burdens, however, suggests its volitionalism. First, as elaborated earlier, *see supra* text accompanying notes 167-70, the Court's actual langnage indicates concern about the cruelty of forcing a believer to choose between conscience and benefits; the model of the stereotypical believer is a volitionalist struggling to make the right choices. Second, in the Court's conception, "indirect coercion" differs from "outright prohibitions" in that it requires believers to choose rather than forbidding or commanding bebavior. The Court thus presupposes that putting the believer to a choice is analytically distinguishable from an outright command, because the believer has some freedom in making choices and is not simply driven by an external stimulus. "Indirect coercion" thus presupposes some degree of free will.

175 *Sherbert*, 374 U.S. at 404.

176 Thomas v. Review Bd., 450 U.S. 707, 718 (1981).

177 "[T]he Free Exercise Clause, and the Constitution generally, recognize such a distinction [between individual and governmental conduct]; for the adjudication of a constitutional claim, the Constitution, rather than an individual's religion, must supply the frame of reference." Bowen v. Roy, 476 U.S. 693, 701 n.6 (1986).

which cause a cognizable external impact on individual conduct and those that are merely internal. As previously discussed, the *Bowen* Court drew this distinction by adopting a theory of individual activity from which to measure internality and externality.[178] The Court apparently believed that the Constitution "generally" enshrines a particular view of moral, religious, or political activity.

The view that the Court had in mind was almost certainly volitionalist. Although it is not the only possible reading, perhaps the most common view is that the Constitution rests on a volitionalist view of moral and political activity. Paradigmatic individuals are moral agents because they are independent and significantly self-determining—uncontrolled by material, sociological, psychological, biological, or theological determinism. This view is plain in the general philosophical underpinnings frequently attributed to the Constitution: in social contractarian theory, the free choice by individuals to enter into civil government is the basis for political legitimacy.[179]

Similarly, the most common view of many constitutional liberties is that they rest on a volitionalist view of moral activity. The Constitution protects certain spheres of autonomy so as to allow individuals to exercise their ability to choose how to live their lives based on their own views about the good life.[180] Such autonomy would be meaningless if individuals were at the mercy of forces be-

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178 *See id.* at 700. A volitionalist, for example, would ascribe no direct religious effect to the color of the government's file cabinets—and therefore, no external limit on his own behavior resulting from their color—but a nonvolitionalist might.

179 In fact, the historical relationship between volitionalism and social contractarianism is somewhat more complicated than is usually recognized. *See infra* notes 316-18 and accompanying text. In contemporary legal circles, however, it seems safe to say that social contractarianism is believed to derive the legitimacy of the state from the individual's free choice to enter the contract.

180 The notion that the Bill of Rights protects the ability of the individual to choose is, of course, so common that it borders on the trite. The more problematic element of this claim is that the Constitution protects choice because individuals can exercise free will and it is important that the state allow them the space to do so. The Court rarely makes this element of the claim explicit. Nonetheless, we think that when the Court speaks of protecting choices, it usually means undetermined choices. We base this conclusion on several factors. First, volitionalism as a moral and political theory is pervasive in our society, and so the most likely reason to protect choices is to allow room for the exercise of free will. Second, the Court has, at times, made its volitionalist interpretation of the Constitution more or less explicit in connection with specific clauses of the Bill of Rights. Third, the Court has regularly denied constitutional rights to those apparently incapable of exercising an autonomous will. *See* John H. Garvey, *Freedom and Choice in Constitutional Law*, 94 HARV. L. REV. 1756, 1757-62 (1981). Other commentators have noted that the Court generally presumes that normally individuals are capable of making self-determined choices. *See* Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 55 & n.217 (1987); Martha Minow, *When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference*, 22 HARV. C.R.-C.L. L. REV. 111, 142-44 & nn.95-96.

yond their control. When an individual speaks, acts, or believes a given way, generally those acts are morally attributable to her will, not to an external web of causation.[181] As Professor Richards has noted, "[t]he vision, ultimately, is one of persons who, because of the effective exercise of their autonomy, are able to identify their lives as their own, having thus realized the inestimable moral and human good of having chosen one's life as a free and rational being."[182]

Thus, the Constitution guarantees the right to free expression in the "marketplace of ideas" so that an individual may freely choose from among a range of ideas and then promote her chosen view by exposition.[183] Alternatively, the speech guarantee exists because "speech is one important way in which we define ourselves as autonomous actors, worthy of human dignity. . . . In speaking, we create our identity and proclaim it to others."[184] Similarly, commentators defend substantive rights under the due process clause as protections for self-determined, individual choice in intimate association.[185] Finally, voting rights arguably emerge from a view of the political self as volitional: the franchise is central to a democratic government because it allows individuals to participate in rational self-determination.[186]

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181 This view of the Constitution does not necessarily presume, of course, that the individual is never subject to determinism. Rather, the Constitution presumes that individuals only sometimes exercise free will, and that this exercise of will is the only basis for moral activity.

182 David A.J. Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution*, 127 U. PA. L. REV. 1195, 1225-26 (1979).

183 *See* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 968-74 (1978). Indeed, the "marketplace of ideas" notion has recently received extensive criticism precisely because many believe that individuals do not "freely" choose their views based simply on a rational, independent, undetermined assessment of the objective truth. Rather, experiences, interests, class location, the "market" itself, and other elements substantially determine the views of individuals. *See, e.g.*, *id.* at 976-78.

184 John H. Garvey, *Free Exercise and the Values of Religious Liberty*, 18 CONN. L. REV. 779, 788 (1986); *see also* Baker, *supra* note 183, at 991-92.

185 Perhaps the clearest articulation of these assumptions occurred in Justice Blackmun's dissenting opinion in Bowers v. Hardwick, 478 U.S. 186, *reh'g denied*, 478 U.S. 1039 (1986):

> We protect those rights not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life. "[T]he concept of privacy embodies the 'moral fact that a person belongs to himself and not others nor to society as a whole.' "

Id. at 204 (Blackmun, J., dissenting) (citation omitted); *see also* Roberts v. United States Jaycees, 468 U.S. 609, 619 (1984) ("Protecting these [intimate] relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty.").

186 Thus, the Court has held that laws barring the insane and children from the franchise are constitutional, whereas wealth requirements are not. *See* Harper v. Virginia

Under this theory of the document, the Constitution guarantees liberties to prevent the state from constricting the individual's exercise of free will. Any state action that imposes a restriction, a direct limitation on individual choice, has constitutionally cognizable external effects on individual activity.[187] However, the Court defines as internal government activity any state action that constricts individual activity only from a nonvolitionalist perspective. Thus, even if an individual believed—for nonreligious reasons—that the color of the government's filing cabinets prevented her from voting Republican or speaking her mind, the Court would presumably conclude that the effect of the government's action was not coguizable in the constitutional "frame of reference." And, since the *Bowen* Court asserted that the general framework for the Constitution is also the framework for the free exercise clause, it must have believed that the free exercise clause incorporated a volitionalist view of religious activity.[188] A free exercise claim, then, must look like a free speech claim or a substantive due process claim.

In Part II, we will argue that even if the Constitution does incorporate a volitionalist paradigm of the moral and political self in some of its provisions, it does not necessarily follow that the free exercise clause also incorporates this frame of reference.[189] Part of religious freedom is the right to select one's own paradigm of the religious self; a freedom without which all other religious liberties may become meaningless. First, however, the next section examines another set of nonvolitionalist claims—Native American sacred land

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Bd. of Elections, 383 U.S. 663, 668 (1966) ("Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process."); Garvey, *supra* note 180, at 1761 ("[U]ltimately the ballot functions as a means of *self*-government, an activity difficult for those incapable of moral and rational choice.") (emphasis in original).

187 In fact, the Court does not even consider "indirect coercion" to be a burden on the substantive due process right of a woman to choose whether to abort a fetus; the state may constitutionally decide to favor childbirth over abortion by granting funding to the former but not the latter. *See* Harris v. McRae, 448 U.S. 297, *reh'g denied*, 448 U.S. 917 (1980); Maher v. Roe, 432 U.S. 464 (1977). This approach seems attributable not to any diminution of the Court's volitionalism—the Court, after all, recognizes that disproportionate funding may well discourage abortions, *see id.* at 474—but rather to the Court's own ambivalence about the abortion right in particular. The Court avers that a weighted choice does not qualify as a burden on the abortion right because the state is allowed to prefer childbirth over abortion. *See id.* at 474 n.8.

188 Professor Baker has recommended precisely such a linkage of the various clauses of the first amendment. Argning that the free speech clause should protect the volitionalist values of self-realization and autonomy, he maintains that the free exercise clause should protect the same values by protecting conscientiously motivated conduct. *See* Baker, *supra* note 183, at 1035-39.

189 *Cf.* Garvey, *supra* note 184, at 788-92 (argning that the autonomy value protected by the other individual rights should not be the value protected by the free exercise clause).

claims—and argues that the Court's treatment of these claims reveals again its volitionalist bias.

SECTION THREE.
THE COURT'S DEFINITION OF A "BURDEN": *LYNG*

Stephen Roy's claim was perhaps factually unusual, but by no means unique, in being based on a nonvolitionalist paradigm of religious activity. Traditionally, the dominant view in this country has been volitionalist, but a variety of nonmainstream religions, especially Native American religions, hold alternative views. In recent years, American Indians[190] have brought a series of nonvolitionalist claims to prevent federal development of sacred sites. Anticipating *Bowen*, the appellate courts tended either to ignore them or to reject them outright.[191] And ultimately, the Supreme Court held that these nonvolitionalist claims fall outside of the protection of the first amendment.[192]

A. Introduction

As a result of the conquest of America, a number of Indian sacred sites are now located on federal property, principally national parks and forests. For religious reasons, many American Indians believe that these lands must be kept in their natural state, or else their people will suffer serious religious consequences.[193] Recently, however, the federal government began to develop these sites in a variety of ways—by building roads through the area,[194] flooding the

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190 We use the terms "Native Americans" and "Indians" interchangeably for the reasons noted by Stephen Cornell: "Both terms are widely used by Indians, and it is by no means clear which is the preferred usage. In general, 'Indian' is more common on reservations and in urban Indian communities, while 'Native American' appears to be preferred in universities, among many intellectuals, and in some Indian organizations." STEPHEN CORNELL, THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE vi (1988).

191 *E.g.*, Wilson v. Block, 708 F.2d 735 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983); Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981); Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980); Dedman v. Board of Land and Natural Resources, 69 Haw. 255, 740 P.2d 28 (1987), *cert. denied*, 485 U.S. 1020 (1988).

192 Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

193 The Supreme Court conceded that development of sacred sites "could have devastating effects on traditional Indian religious practices" and that "the threat to the efficacy of at least some religious practices is extremely grave." *Id.* at 451. The federal appellate courts made similar concessions. *See* cases cited *supra* note 191. Thus, the negative religious effect of development was simply not an issue in these cases; rather, the issue was whether the effect was of a kind cognizable under the religion clauses.

194 *See* Northwest Indian Cemetery Protective Ass'n v. Petersen, 764 F.2d 581 (9th Cir. 1985), *withdrawn & aff'd on rehearing*, 795 F.2d 688 (9th Cir. 1986), *rev'd sub nom.* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

sites,[195] or, in one case, allowing the construction of a private ski resort on them.[196] In response, individual Indians and Indian groups have brought free exercise claims to prevent this development.

The sites are sacred to Native Americans in at least two ways.[197] First, Indians must have access to the sites to perform certain religious activities, such as gathering medicine or celebrating rituals, so as to bring about a desired end, such as healing the sick. Federal development may interfere with these activities in ways which do not involve ascribing inherent religious significance to the government's actions, *e.g.*, by flooding the spot or prohibiting entrance. Indians therefore brought claims to stop such development or to gain access to the sites so as to conduct their religious activities. For convenience, we will call these access claims.

Access claims may be readily understood in volitionalist terms.[198] The central religious activity is individual behavior chosen by the Indians for religious reasons. The Indians' failure to participate in the prescribed activities at these sites causes the harmful ef-

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195 *See, e.g., Sequoyah*, 620 F.2d at 1162; *see also* Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981) (site flooded as an indirect consequence of construction and operation of adjoining dam).

196 *See* Wilson v. Block, 708 U.S. 735, 740 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983).

197 The Indians themselves may not distinguish between the two ways in which sites are sacred, but the distinction is necessary for analysis because the courts draw it, implicitly or explicitly. *Cf.* Note, *American Indian Sacred Religious Sites and Government Development: A Conventional Analysis in an Unconventional Setting*, 85 MICH. L. REV. 771, 778 n.48, 791 n.138 (1987) (authored by Mark S. Cohen) (noting the distinction between claims about impaired access to the site and about the intrinsic sacredness of the site).

198 Some Indian religions contain very substantial volitionalist elements. Many focus on the importance of ritual propriety; humans must carefully adhere to religious rules in order to ensure the continued harmony of the natural world. *See, e.g.*, JERRY KAMMER, THE SECOND LONG WALK 32-33, 58-59 (1980). The Hopi religion is perhaps the best example of volitionalism. The Hopi Way, the core of their religion, is an elaborate set of rules, and "they believe they can, through regulating their behavior, emotions and thoughts in a prescribed manner, exercise a measure of control over their environment." LAURA THOMPSON & ALICE JOSEPH, THE HOPI WAY 37 (1965).

On the other hand, some access claims may appear volitionalist but, from the Indians' perspective, are not, since the event that produces religious effects is the ceremony itself, not the choice to engage in the ceremony. Moreover, some of these claims are not even truly individualist because failure to perform a ceremony may negatively affect not only the potential celebrant but also those in no sense responsible for the failure. Even truly volitionalist claims, such as the Hopis', are closely linked to nonvolitionalist claims. The Hopi kachina dances are a good example. For the kachina dances to be effective, the Hopi must engage in weeks of spiritual discipline and self-control, but the sacred site must also be undefiled by development. *See* J. KAMMER, *supra*, at 59. Moreover, the failure of one of the celebrants can have dire consequences for all of the Hopis in a given village. *See* L. THOMPSON & A. JOSEPH, *supra*, at 41. The point, however, is not that any of these claims are truly volitionalist, but that the courts can and have assumed they were volitionalist. As a result courts have extended more protection to these claims than others.

fect. The burden imposed by government development is readily cognizable from a volitionalist perspective: the government effectively prevents the Indians from engaging in religious behavior on the sites by preventing access in ways that do not depend on ascribing inherent religious significance to the government's actions. In light of *Bowen*, then, we would expect that a volitionalist Court would be sympathetic to some range of access claims, and, in fact, the cases bear out this prediction.

The sites are also sacred to the Indians in a more fundamental and nonvolitionalist way: These sites effectively define an Indian religion and an Indian people. In several important senses, the sites, rather than the activities surrounding them, constitute the religion of Native Americans.[199] First, many Indian groups believe that the natural world began in chaos and threatens to slip back into chaos. The sacred site, in its natural state, gives religious meaning and order to the world because the supernatural enters the natural world there. Since the natural and the supernatural commingle at the site, the site provides a fixed point of absolute value so that natural chaos can become order only by reference to this point, this inbreaking of the supernatural.[200]

Second and relatedly, a site in its natural state is necessary to the cosmic harmony of the universe and the sacred balance of the land. Since the "Gods live there" (either literally or by analogy to non-Indian religious concepts) or because of the site's significance in giving meaning to the world,[201] the site is the axis which assures continued harmony.

Third, sacred sites religiously define the Indians as a people by providing the central connection between them and the supernatural. These sites bridge the natural and the supernatural, for the Indians began their existence as a people by erecting these bridges and entering the world on them. In this sense, the site defines the tribe as a people; without it, they will cease to exist as a religious or cultural body.[202] Finally, Native Americans believe that their ceremonies can have spiritual effect only if the sites are in their natural

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199 The following is a composite description of the claims; not all of the claims exhibit all of the listed features.

200 *See, e.g.*, Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159, 1162 (6th Cir.), *cert denied*, 449 U.S. 953 (1980); WILLIAM E. COFFER, SPIRITS OF THE SACRED MOUNTAINS 51-52 (1978); M. ELIADE, *supra* note 66, at 29-54.

201 *See, e.g.*, Wilson v. Block, 708 F.2d 735, (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983); Badoni v. Higginson, 638 F.2d 172, 177 (10th Cir. 1980), *cert. denied*, 452 U.S. 945 (1981); *Sequoyah*, 620 F.2d at 1160; A. HULTKRANTZ, *supra* note 91, at 60-64; JOHN UPTON TERRELL, THE NAVAJOS 3 (1970); L. THOMPSON & A. JOSEPH, *supra* note 198, at 42 (1944 ed.); Ortiz, *supra* note 90, at 187.

202 *See, e.g.*, *Wilson*, 708 F.2d at 740 n.2; *Sequoyah*, 620 F.2d at 1162; JOHN BIERHORST, THE MYTHOLOGY OF NORTH AMERICA 78, 82-83, 192-93 (1985); W. COFFER, *supra* note

state. The success of the ceremonies depends not only on the activity of individuals but also on the condition of the world, a quality beyond the control of the Indian practitioners.[203]

Therefore, governmental modification of these sacred sites causes great damage to Native American religions, even if the Indians are not complicit in the modification. According to the Indians, alteration of the sites will turn order into chaos, disrupt the sacred balance of the land, destroy the existence of the Indians as a people, and deprive Indian practitioners of all spiritual efficacy. Consequently, the Indians have brought claims to enjoin any federal alteration of the land. For convenience, we will call these disruption claims. Disruption claims are nonvolitionalist because the central element is not individual religious obligation[204] but preservation of the land, which is of the utmost importance regardless of who performed the alteration. The Indians thus ascribe desecratory effect to the government's activity—building a road, flooding the site, or allowing the presence of tourists.

Despite the grave religious effect, one would predict that volitionalistically biased courts would prove unreceptive to disruption claims because they are nonvolitionalist in nature. In fact, with one exception, courts have rejected the Indians' disruption claims. In 1985, the Ninth Circuit created a split in the circuits by becoming the only court to grant such a claim. That decision was also the first sacred land opinion to be overturned by the Supreme Court.[205]

200, at 51-52; P. MATTHIESSEN, *supra* note 90, at 119-21; Ortiz, *supra* note 90, at 181-83, 187.

203 *See, e.g.*, Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 592 (N.D. Cal. 1983), *aff'd in part and vacated in part*, 764 F.2d 581 (9th Cir. 1985), *withdrawn & aff'd on rehearing*, 795 F.2d 688 (9th Cir. 1986), *rev'd sub nom.* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); Badoni v. Higginson, 455 F. Supp. 641, 644 (D. Utah 1977), *aff'd*, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).

204 In some cases, such disruption claims might be associated with a related volitionalist claim that the Indians are under a duty to keep the land in its natural state. *See Wilson*, 708 F.2d at 740.

205 *See* Northwest Indian Cemetery Protective Ass'n v. Peterson, 764 F.2d 581 (9th Cir. 1985), *withdrawn & aff'd on rehearing*, 795 F. 2d 688 (9th Cir. 1986), *rev'd sub nom.* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988). We consider here only the Indians' free exercise challenges to the development of sacred sites. The Indians also brought claims under the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996 (1988), a congressional policy statement that recognizes the unconventional nature of Indian religions and recommends a more sensitive approach, especially regarding sacred sites. The courts, however, have concluded that AIRFA is only a policy statement and has " 'no teeth.' " The Act mandates administrative " 'consideration' " of Indian interests but creates no substantive rights. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 455 (1988) (quoting 124 CONG. REC. 21,444-45 (1978) (statement of Rep. Udall)); *see* Note, *The First Amendment and the American Indian Religious Freedom Act: An Approach to Protecting Native American Religion*, 71 IOWA L. REV. 869, 891 (1986) (authored by Diane Brazen Gould); Note, *The American Indian*

B. Before *Lyng*: The Early Sacred Land Cases

Well before the Supreme Court had occasion to reveal its volitionalist bias in *Bowen*, the appellate courts were already rejecting nonvolitionalist sacred land claims based on a volitionalist reading of the Constitution. The Court's decisions in *Lyng* and *Bowen*, therefore, did not so much lead the way as they did ratify the volitionalist bias. A quick review of the major cases suggests the virtual ubiquity of the volitionalist viewpoint among the circuit courts before *Lyng*.

In the first major case, *Sequoyah v. Tennessee Valley Authority*,[206] the Cherokees sought to prevent the flooding of the Little Tennessee Valley. They believed the flooding would sever the Cherokee connection with the Great Spirit, rooted in the historical origin of the Cherokees in that valley.[207] The court stated that the free exercise clause protects only religious practices that are "central[ ]" to a religion,[208] a restriction that the Supreme Court has since definitively rejected.[209] The court's reason for adopting this novel restriction may perhaps be gleaned from its explanation of why the valley is not "central" to the Cherokees: "The overwhelming concern of the affiants appears to be related to the historical beginnings of the Cherokees and their cultural development. It is damage to tribal and family folklore and traditions, more than particular religious observances, which appears to be at stake."[210] In other words, the court will recognize as central only religious harms arising from limits on an individual's "particular religious observances." Nonvolitionalist harms caused by the government's severing the "historical" connection between a people and a geographical feature are automatically peripheral.

Next, in *Badoni v. Higginson*,[211] the Tenth Circuit rejected the Navajos claim that the presence of tourists at Rainbow Bridge National Monument desecrated a sacred site. For relief, the Indians

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Religious Freedom Act—An Answer to the Indians' Prayers?, 29 S.D.L. REV. 131, 137-39, 143 (1983) (authored by Rex P. Craven).

206 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980).

207 *Id.* at 1162.

208 *Id.* at 1164.

209 *Lyng*, 485 U.S. at 457-58. To be fair to the *Sequoyah* Court, some academic commentators urged a kind of "centrality" test as a way of limiting the potential reach of *Sherbert*, and courts may perhaps be forgiven for listening to academics. *See* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-12, at 1246-48 (2d ed. 1988); Joseph M. Dodge, II, *The Free Exercise of Religion: A Sociological Approach*, 67 MICH. L. REV. 679 (1969); Kent Greenawalt, *All or Nothing at All: The Defeat of Selective Couscientious Objection*, 1971 SUP. CT. REV. 31, 87. However, the centrality test had no clear basis in case law when *Sequoyah* was decided. The question still remains as to why the court decided to apply the test to the Indians' claim and not to other, more volitionalist claims.

210 *Sequoyah*, 620 F.2d at 1164.

211 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).

requested an injunction ordering the National Park Service to regulate the behavior of the tourists. The court asserted that most free exercise claims involve one of the two volitionalist burdens: "[G]overnment dictates which compel citizens to violate tenets of their religion [direct coercion] . . . or government action which conditions a benefit or right on renunciation of a religious practice [indirect coercion]."[212] The court also suggested that it might recognize a pure access claim alleging such a burden: "The government . . . has not prohibited plaintiffs' religious exercises in the area of Rainbow Bridge; plantiffs may enter the Monument on the same basis as other people."[213] But the Navajos complained that religious harm arose, not from their own inability to gain access, which might be volitionalist, but from the conduct of the tourists—which is nonvolitionalist because the Indians suffered for another's actions.

The court denied the request for an injunction regulating the behavior of tourists, stating that it would violate the establishment clause since its "avowed purpose" was "aiding plaintiffs' conduct of religious ceremonies."[214] The Supreme Court, however, had previously unequivocally rejected the Tenth Circuit's apparent premise. The Court stated that accommodation of religious practice required by the free exercise clause is not forbidden by the establishment clause.[215] The Tenth Circuit chose to overlook this unambiguous precedent, apparently because the Navajos claim does not follow the "normal" volitionalist pattern.

Finally, in *Wilson v. Block*,[216] Navajo and Hopi plaintiffs claimed that the construction of a ski resort in the San Francisco mountains would desecrate the sacred area, destroying the Indians' existence as a people and rendering their ceremonies ineffective. The court accurately characterized these nonvolitionalist claims in its summary of the facts,[217] but then in its rationale and holding, the court mischaracterized or iguored them. First, the court addressed what it termed the Navajos "belief" claims—their unease and fear caused by the threat of desecration of the site.[218] In its consideration and subsequent rejection of belief claims, the court addressed only the

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212 *Id.* at 178.

213 *Id.*

214 *Id.* at 179.

215 *See* Wisconsin v. Yoder, 406 U.S. 205, 220-21, 234 n.22 (1972); Sherbert v. Verner, 374 U.S. 398, 409 (1963); *see also* Gary J. Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905, 913-14 (1987) (a "purpose of complying with the mandate of the free exercise clause" is legitimate under the establishment clause).

216 708 F.2d 735 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983).

217 *Id.* at 740 & n.2.

218 *Id.* at 740.

Indians' fears, not the Indians' contention that desecration would cause limits on their practice.

The court then considered practice claims. It interpreted these claims as volitionalist because they were based on the need to gain access to the site so as to gather medicines and perform ceremonies. Relying on *Sequoyah*, the court held that the free exercise clause extends protection only to "indispensable" sites in the sense that the "religious practice . . . could not be performed at any other site."[219] Since the Indians physically could perform ceremonies elsewhere, the court rejected their claim. But again, the court failed even to address the Indians' nonvolitionalist practice claims. These claims maintain not that the Indians must be allowed to perform their ceremonies somewhere in the area, but that the government must not develop the area at all. If the government did so it would be desecrating the mountains, thereby disrupting the Indians' whole way of life and rendering all their site-connected ceremonies ineffective, wherever performed. The court apparently ignored or did not understand this nonvolitionalist aspect of the challenge.

The courts thus rejected all of the early sacred land claims for reasons connected to their nonvolitionalist nature. Even prior to *Bowen*, volitionalism had become a part of free exercise clause jurisprudence. After *Bowen*, it was perhaps predictable that the Supreme Court would ratify this tendency. The Ninth Circuit gave it the occasion to do so when it became the first court to approve a sacred land claim.

C. *Lyng v. Northwest Indian Cemetery Protective Association*

1. *The Lower Court*

In *Northwest Indian Cemetery Protective Association (NICPA) v. Peterson*,[220] the Ninth Circuit became the first federal court to find for the Indians in a sacred land case. The basic claim was nonvolitionalist. For generations, spiritual leaders of various Northwest tribes have travelled into the High Country, a segment of the Siskiyou Mountains, to communicate with the Great Creator and receive power. For these medicine quests to be spiritually effective, the area must remain in its "unitary pristine nature."[221] In 1977, the National Forest Service decided to build a logging road through the High Country, and the Indians sought to enjoin its construction.[222] This

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219 *Id.* at 744.

220 764 F.2d 581 (9th Cir. 1985), *withdrawn and aff'd on rehearing*, 795 F.2d 688 (9th Cir. 1986), *rev'd sub nom.* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

221 Northwest Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d at 692.

222 The Indians also challenged the Forest Service's decision to allow timber har-

claim was nonvolitionalist because the Indians ascribed direct religious significance to the government's own actions. The believer mainly suffered harm not from his failure to honor his obligations, but from the government's desecration of the site, making the quester's spiritual development impossible. Indeed, the claim closely echoed Roy's: government activity would "rob [the questor] of . . . spiritual power."[223]

Application of the *Bowen* standard would thus have required denial of the Indians' claim.[224] Only in the Indians' "frame of reference" does the government limit religious practice; from the constitutional "frame of reference," the road placed no cognizable limit on individual conduct at all.[225] The government's use of its own land would seem to be a clearly "internal governmental procedure" since the only external effect would occur as a result of religious consequences ascribed by the believer directly to the government's activity.

The Ninth Circuit held, however, that construction of the road would burden the Indians' free exercise rights. The court rejected the government's argnment that the Constitution prohibits only penalties for volitionalist religious practices. Instead, the court adopted the broad interpretation of *Sherbert*'s definition of "burden"

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vesting in the High Country, but this claim became moot when Congress statutorily prohibited harvesting in the area. Congress allowed logging, however, in a 1200-foot wide corridor, following the path of the proposed road, and the Indians challenged logging in this area.

223 Bowen v. Roy, 476 U.S. 693, 696 (1986). The Indians' claims also involved some seemingly volitionalist elements, but these all depended on the nonvolitionalist claim. In particular, the Indians alleged that they were under an "obligation" to perform certain ceremonies at the site, and failure to do so would produce negative religious effects. *See Lyng*, 485 U.S. at 460 (Brennan, J., dissenting); *NICPA*, 764 F.2d at 585-86. These effects would thus be volitionalistically caused. However, the Indians would be unable to engage in those ceremonies for nonvolitionalist reasons. The government had desecrated the site and therefore the ceremonies could not have their intended effect. The causal sequence thus parallels that of Roy's claim: Government Regulation (building a road, using a social security number)—> Religious Effects (desecration of a site, loss of spiritual power)—> Limits on Individual Activity—> Further Religious Effects.

224 *Cf.* Dedman v. Board of Land and Natural Resources, 69 Haw. 255, 258-64, 740 P.2d 28, 31-34 (1987), *cert. denied*, 485 U.S. 1020 (1988). Appellants, Pele practitioners, claimed that development of geothermal resources in a sacred Hawaiian Island would "desecrate the body of Pele by digging into the ground and . . . destroy the goddess by robbing her of vital heat." *Id.* at 261, 740 P.2d at 32. This deprivation would interfere with the training of the young and other religious practices. Citing *Bowen*, the Supreme Court of Hawaii perfunctorily refused to find a burden on practice or belief.

225 The Indians' nonvolitionalist claim should be carefully distinguished from a potential claim that they did not make. The Indians argued that their individual conduct was limited as a result of government desecration of the site, not of government denial of access to the site. For example, the Indians could have claimed that the road might run over the site or the traffic might be such that they could not get to the site. This latter claim would not involve ascribing inherent religious significance to the government's actions.

sketched earlier: A burden is any "[g]overnmental action that makes exercise of first amendment rights more difficult or impedes religious observances."[226] Construction of the road would impede the Indians' vision quest by degradation of " 'salient . . . environmental qualities' " necessary for those quests.[227] The Ninth Circuit thus dissented from the view implicit in the other sacred land cases by holding that all governmental interferences with religion may be cognizable burdens.

The circuit panel handed down its original decision before the Supreme Court decided *Bowen*, and on rehearing,[228] the panel unsuccessfully attempted to distinguish that case.[229] Shortly thereafter, the Supreme Court granted certiorari under the name *Lyng v. Northwest Indian Cemetery Protective Association* and reversed.

2. *The Majority*

In *Lyng*, the Supreme Court came much closer than in *Bowen* to

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226 *NICPA*, 764 F.2d at 586.

227 *Id.* at 585 (quoting Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 594-95 (N.D. Cal. 1983)). Actually, degradation of " 'salient . . . environmental qualities' " might describe either a volitionalist or a nonvolitionalist burden. If the court meant that the road disrupted the natural environmental condition of the mountain and so desecrated it, the burden was nonvolitionalist, because the government's action had a direct religious effect. The Supreme Court seems to have adopted this interpretation. *See infra* notes 242, 243, 245 and accompanying text. If, however, the court merely meant that the degradation of the environment prevented, in some practical way, the Indians from engaging in their quests, then the burden was volitionalist because it involved a non-ascriptive restriction on individual conduct.

228 Northwest Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688 (9th Cir. 1986), *rev'd sub nom.* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

229 The circuit court distinguished the cases in two ways. First, "[t]he fact that the proposed government operations would virtually destroy the plaintiff Indians' ability to practice their religion differentiates this case from *Bowen v. Roy*." *Id.* at 693. The court might have been correct that the harmful effect in *NICPA* was greater than in *Bowen*, but the *Bowen* Court did not reject Roy's claim because the degree of harm was slight. Rather, the *Bowen* Court rejected the claim because the government regulation was of the wrong form—"internal" governmental action, rather than external limits on individual conduct.

The circuit court then attempted to characterize the conduct as external because the public had access to the land: "[L]ogging and road-building on public lands, to which the public has access, is not the kind of internal governmental practice that the Court found beyond free exercise attack in *Roy*." *Id.* But the *Bowen* Court did not find the use of the social security number internal because it took place behind locked doors, but because the external effects occurred only in Roy's own religious "frame of reference." Similarly, here, desecration of a site could occur only in a religious frame of reference because it involved ascription of inherent religious significance to the government's actions. The court's distinction, moreover, would lead to absurd results. If federal land use is external whenever the public has access to the land, then the government may free itself of all constitutional restraints simply by completely preventing access. Such a distinction might allow a greater religious harm, denial of all access, but not a lesser one, construction of a road.

announcing in so many words that the first amendment protects only those claims that find religious significance exclusively in the believer's own choices. The Court asserted that the claims in *Bowen* and *Lyng* were "remarkably similar."[230] In *Bowen*, the claimant maintained that the state's use of a social security number would "rob the spirit" of his daughter. In *Lyng*, "disruption of the natural environment caused by the G-O road [would] diminish the sacredness of the area in question and create distractions" for the seeker.[231] The Court explained the similarities between the two cases, quoting from *Bowen*:

> "The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens. Just as the Government may not insist that [the Roys] engage in any set form of religious observance, so [they] may not demand that the Government join in their chosen religious practices by refraining from using a number to identify their daughter."[232]

As we have argued, the *Bowen* Court intended this language to limit protection to volitionalist claimants. Believers cannot ascribe inherent religious significance to the government's actions and require it to "join in" their practices. Government action might have exterual effects on the believer as a result of such ascription, but the Court refuses to read this perspective into the Constitution.

In the same way, the *Lyng* Court asserted that internality is not measured from the believer's perspective. The Court openly conceded that the challenged government action would "interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs."[233] Indeed, the road might "have devastating effects on traditional Indian religious practices."[234] From the believer's point of view, "[r]obbing the spirit of a child, and preventing her from attaining greater spiritual power, is both a 'substantial external effect' and one that is remarkably similar to the injury claimed by respondents in the case before us today."[235] But that effect is external only from the perspective of the believer, not from that of the Constitution.

In both *Bowen* and *Lyng*, the Court implicitly maintained that the constitutional frame of reference is volitionalist. According to the Court, the Constitution recognizes two and only two kinds of bur-

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230 Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 456 (1988); *see id.* at 452.

231 *Id.* at 448.

232 *Id.*

233 *Id.* at 449.

234 *Id.* at 451.

235 *Id.* at 456.

dens, both of them prototypically volitionalist. First, the free exercise clause protects individuals from being directly "coerced by the Government's action into violating their religious beliefs."[236] The Court identified "indirect coercion" with "outright prohibition,"[237] and specifically distinguished nonvolitionalist coercion: "[T]he location of the line [between actions that create a cognizable burden and those that do not] cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development."[238]

Second, the Constitution forbids weighted choices, which the Court called "indirect coercion or penalties": "denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens" because he insists on maintaining his religious practice.[239] Such government actions do not literally coerce the believer because he could forgo his rights, benefits, and privileges and continue his practice. But they do "have [a] tendency to coerce individuals into acting contrary to their religious beliefs" and so are like "a fine imposed on . . . worship."[240]

The Court's recognition of only these two burdens as religious harms suggests a generally individualist and specifically volitionalist bias.[241] This bias is plainly individualist: The Court emphatically denied that government action have any direct religious siguificance, such as desecration of a site. Religious harms could occur only because individuals misbehaved in various ways. Indeed, the Court specifically suggested that an individualist pure access claim might be cognizable: "[A] law prohibiting the Indian respondents from visiting the Chimney Rock area would raise a different set of constitutional questions."[242] Thus, government action desecrating

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236 *Id.* at 449. For an analysis of *Bowen* and *Lyng* as adopting a "coercion" model of burden, see Lupu, *supra* note 5, at 944-46. Although consistent with our reading, the coercion model does not explicitly address the individualistic and volitionalist aspects of the cases. Lupu is, however, quite critical of the coercion model on other grounds, *see id.* at 961-63, and proposes an alternative approach that measures burden by asking whether the government action would have been actionable under common-law principles if it had been committed by a private party. *Id.* at 966.

237 *Id.* at 450.

238 *Id.* at 451.

239 *Id.* at 449-50.

240 *Id.* at 450.

241 *See supra* text accompanying notes 155-78.

242 *Lyng*, 485 U.S. at 453. The full passage reads: "The Constitution does not permit government to discriminate against religions that treat particular physical sites as sacred, and a law prohibiting the Indian respondents from visiting the Chimney Rock area would raise a different set of constitutional questions." *Id.* It would be a mistake to interpret this passage as suggesting merely that a law that barred access only to Indians would be invalid because facially discriminatory. Rather, a law that barred access to everyone would be discriminatory as applied to the Indians because they are differently situated (they treat sites as sacred), just as the laws in *Sherbert* and *Yoder* were neutral on

a site would present no cognizable effect, but government action denying access to the site would, because the religious harm would arise not from the inherent significance of the government action but from the inability of Indians to perform ceremonies there. In both, the effect is the same, but in the latter, the individualist form brings the claim within the protection of the first amendment.

Even more clearly than *Bowen*, moreover, the *Lyng* Court meant to limit protection not only to individualist claims but specifically to volitionalist claims. As we have already argued, weighted choices and facial prohibitions are the prototypical volitionalist burdens because they put pressure on a believer to make the wrong choice by threatening a jail sentence or loss of benefits. The particular facts of this case also suggest the Court's resolution to limit protection to specifically volitionalist harms. The Court described the logging road as interfering with the Indians' ceremonies in two ways, from the Indians' point of view. First, the government action directly desecrated the site. This harm was "internal" to the government in any individualist scheme, volitionalist or nonvolitionalist, because individual action did not cause the negative effect. But the second interference, the road's creation of distractions for the medicine-seeker, was internal only in a volitionalist scheme. A nonvolitionalist individualist perspective could accommodate this claim, because individual conduct caused the negative religious effect: The failure of the seeker to complete his quest on account of the distractions. But a true volitionalist might find the distractions irrelevant: the pilgrim would need only to concentrate harder on his goal and ignore the irritating but ultimately irrelevant logging trucks.[243] Thus, by deny-

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their face but discriminatory when applied. *See supra* text accompanying notes 104-17. Under this interpretation, the rule's flaw is not that it is facially discriminatory but that it operates to "coerce" the Indians.

This second interpretation is more convincing for several reasons. First, Justice O'Connor did not specify that the hypothetical law denies access to the Indians but to no one else. Rather, she specified that the law denied the Indians access, so that coercive denial of access, not discrimination, was the critical feature. Second, this interpretation fits best with O'Connor's focus throughout the opinion, which is not on discrimination, but on coercion. Third, the very next line in the paragraph is the following: "Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, *its* land." *Lyng*, 485 U.S. at 453. Again, the opinion focused not on discrimination between the Indians and everyone else, but on the positive right of the Indians to gain access to the area without "vetoing" governmental action desecrating the area.

243 Actually, even a volitionalist might recognize this claim if characterized correctly. The *Lyng* Court never explained why this "distraction" was not like an indirect coercion or a penalty, since "distractions," in either a volitionalist or nonvolitionalist view, would "tend to coerce" a believer not to complete a ceremony. The noise of the trucks in effect penalized the believer for choosing to go on the quest. Or, to put the matter another way, from a volitionalist perspective, this is a weighted choice. The believer

ing this second claim, the Court implicitly denied protection even to individualist but nonvolitionalist claims.

Indeed, the Court's volitionalist outlook is so deep, pervasive, and unexamined, that the Court at times seemed to forget that any other view is possible. The Court purported to draw its limitation on cognizable burdens from the word "prohibit" in the text of the free exercise clause. Acknowledging that not only direct but indirect coercion would cognizably burden religious practice, the Court nonetheless insisted:

> This does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions. The crucial word in the constitutional text is "prohibit."[244]

But the unemployment law in *Sherbert* did not literally prohibit the claimant from observing her Sabbath, because she could simply have forgone her benefits. True, such self-denial would have made it "more difficult" for her to practice her religion, but the Court found that difficulty standing alone to be irrelevant. By contrast, the government action in *Lyng* does effectively prohibit the practice of vision quests, from the Indians' perspective, as the Court itself ac-

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must choose between finishing the ceremony, even though it is less pleasant to do so, or giving up and going home.

There are several possible explanations why the Court did not view this as a volitionalist weighted choice. First, as we suggest later, *see infra* text accompanying notes 253-55, the Court may have intended to recognize only some but not all volitionalist claims. In particular, it may have intended to recognize only the de jure version of such claims. The "distractions" claim described here is a de facto claim because the challenged regnlation does not facially refer to the religious behavior in question—the vision quests—and either forbid it or attach a cost to it. Rather, the regnlation simply calls for the construction of a road, but the road traffic de facto disrupts the quester's concentration.

The more likely explanation, however, seems to be that the Court believed that the distractions are themselves desecrations of the site. It is for that reason that believers cannot complete their quests. The Court never considered the distraction claim separately from the desecration claim and at times seemed to combine the two. *See Lyng*, 485 U.S. at 448 ("Scarred hills and mountains, and disturbed rocks destroy the purity of the sacred areas, and [Indian] consultants repeatedly stressed the need of a training doctor to be undistracted by *such* disturbance.") (emphasis added). In the words of the district court, construction of the road would disrupt the "salient visual, aural, and environmental qualities of the high country" necessary for "[c]ommunication with the 'great creator.'" Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 594-95 (N.D. Cal. 1983), *aff'd in part and vacated in part*, 764 F.2d 581 (9th Cir. 1985), *withdrawn & aff'd on rehearing*, 795 F.2d 688 (9th Cir. 1986), *rev'd sub nom.* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988). From a volitionalist perspective, the distraction claim does not exist because the desecration does not exist.

244 *Lyng*, 485 U.S. at 450-51.

knowledged. If the road went through, the Indians simply could not go on vision quests.

Thus, the unadorned word "prohibit" in no way suggests the result in *Lyng* because, from the believer's perspective, the government action in *Lyng* involved more "prohibition" than did the government action in *Sherbert*. Only by adopting a specifically volitionalist reading of the word could the Court equate "prohibit" with the particular burdens that it did recognize: Making the believer choose between his religion and criminal sanctions or a loss of benefits.[245] From this perspective, there is not even a "tendency to coerce" in *Lyng* because the volitionalist refuses to recognize that a government action could have direct religious significance. Wherever this volitionalist reading of "prohibit" comes from, it is not the bare langnage of the first amendment alone; the Court must import its volitionalist assumptions about the nature of reality into the word "prohibit." Yet, the Court's volitionalist outlook runs so deep that it did not even recognize that the word "prohibit" might have profoundly different meanings in other frames of reference.

The Court offered one other reason for its restriction of free exercise protection to volitionalist claims—a parade-of-horribles argnment, the second in a series of such argnments that began with *Bowen* and would culminate in *Smith*:

> [G]overnment simply could not operate if it were required to satisfy every citizen's religious needs and desires. . . . The Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours.[246]

For practical reasons, then, the Constitution cannot subject to the compelling state interest test all government actions that make some religious practices somewhat more difficult; if it did the government might be crippled.

This argument, however, establishes only that the Court must place *some* limit on the reach of the free exercise clause, not that this particular limit is the appropriate one. After all, volitionalist claims

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245 A different, more obvious reading of the word "prohibit" is "forbid." Thus, only those laws, like those in *Yoder*, that specifically outlaw conduct demanded by a religion or require conduct forbidden by a religion would count as burdens. But the Court obviously did not intend to adopt this meaning because it also granted protection against "indirect coercion"—laws that do not explicitly forbid certain conduct but that simply extract a price for that conduct. Rather, the Court believed that "prohibit" means "coerce" (direct coercion) or "have a tendency to coerce" (indirect coercion). Nonetheless, the Court refused to recognize the coercion or tendency to coerce created by the government actions to which the believer nonvolitionalistically ascribed direct religious significance.

246 *Lyng*, 485 U.S. at 452.

also threaten the freedom of government action, but the *Lyng* Court ignored that danger. Indeed, there are two responses to the Court's concern that are more obvious and more neutral. First, the Court could have overruled *Sherbert* altogether by holding that neutral laws place no cognizable burdens on religious practice, volitionalist or not. In effect, the Court pursued this course last Term, but significantly the *Lyng* Court declined to do so. Alternatively, the Court could have held that neutral laws may pose cognizable burdens on all varieties of claims but some claims must be disallowed because they create too much disruption. Such a holding would focus not on the content of the religion but on the real concern, the restriction placed on the government's legitimate interest. The Court decided not to adopt this course, either.

Instead, the Court adopted a discriminatory standard: it specifically affirmed *Sherbert*, but only for volitionalist claims. From the time that *Sherbert* was argued, some commentators have insisted that the *Sherbert* rule would make it impossible for the government to function. Until *Bowen* and *Lyng*, however, those voices fell on deaf judicial ears. As long as the Court had before it only volitionalist claims, it was prepared to accept frustration of government policies in order to get freedom for religious practice. Only when the Court faced its first nonvolitionalist claim did concerns about government freedom occupy center-stage, and then only for nonvolitionalist claims. As we will discuss in Part II, some nonvolitionalist claims may pose more disruption to the government than typical volitionalist ones, but not all. Roy's claim, for example, would inconvenience the government less than Sherbert's. If the Court were concerned solely with the state's ability to function, it could have adopted a standard that disallowed any claim that disrupted the government too much—but only and all such claims, whether or not they were volitionalist.

The Court offered only one reason for the discriminatory path it chose: Its volitionalist reading of the textual term "prohibit." In the course of explaining that any rule other than *Bowen*'s would cripple the government, the Court insisted: "The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion."[247] The free exercise clause, in other words, does allow some believers to veto a public program, but only programs that "prohibit" religious practice in the Court's volitionalist sense. The Court thus created two categories of believers: volitionalists, who had the veto, and nonvolitionalists, who did not.[248]

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247 *Id.*

248 The *Lyng* majority drew a spirited dissent advocating a broad reading of *Sherbert*

D. Alternative Interpretations of *Bowen* and *Lyng*

We have now offered an elaborate interpretation, based on limited textual evidence, of the Court's decisions in *Bowen* and *Lyng*. We recognize that reconstruction of the Court's likely meaning on the basis of such fragmentary evidence is not "proof" of that meaning in any absolute sense. Thus, we acknowledge that many are likely to disagree with us and offer alternative accounts of the two cases. This subsection will address some of those accounts. We would like to emphasize first, however, the limited nature of our argnment: the Court's volitionalist bias is necessary but not necessarily adequate to account for the Court's recent jurisprudence. This bias alone may not explain the Court's behavior but it is nonetheless a salient feature of that behavior.

First, many may concede that the two cases create a theological orthodoxy by stopping some claims at the threshold, but disagree with us about the precise orthodoxy. In particular, some may believe that our demonstration of an individualist bias is convincing, but maintain that our argument for a volitionalist bias is primarily speculative. These readers might then argne that an individualist orthodoxy is really not unduly restrictive.[249] As already indicated, we believe that individualism is indeed a somewhat plausible alternative account of the cases, but it really makes no difference which of these two interpretations is closer to the truth. As we will argue, while religious liberty must indeed have limits, a content-based the-

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that would recognize a burden whenever "any form of governmental action . . . frustrates or inhibits religious practice." *Id.* at 459 (Brennan, J., dissenting). Like the Ninth Circuit, the dissent tried to distinguish *Bowen* by maintaining that the use of the social security number in that case was merely a matter of "how the Government conducts its own affairs" and thus was purely internal. *Id.* at 470. The dissent, however, revealed its own continuing volitionalist bias, because from Roy's perspective the government's "own affairs" also "inhibit[ed] religious practice." Only by adopting some "frame of reference" can the state action in *Bowen* but not in *Lyng* be dubbed the government's "own affair" (even in *Lyng*, in the majority's words, the sacred site "is, after all, [the federal government's] land" and therefore its own affair), but the dissent never outlined such a frame. The dissent seemed caught and confused: it agreed to exile nonvolitionalist religions in *Bowen* but then found the claims in *Lyng* much more sympathetic, perhaps because of their antiquity, seriousness, and relative popularity. But the dissenters could never see through their own volitionalist bias long enough to realize that the Court would have to overrule *Bowen* to allow the sacred site claims.

249 After all, notice how broad our term individualism is: it embraces all those religions that believe that only the actions of an individual can give rise to religious consequences for that individual. In the first place, the term implies nothing about why religious consequences should be so restricted—because it is fair, because God wills it, or for any other reason. In the second place, the term implies nothing about the psychology, the causes, or the ultimate origin of human behavior. In particular, humans may or may not possess free will; and if determined, they may be determined in any way and to any degree.

ological orthodoxy, however broad, is the least appropriate way to create those limits.

Other readers might acknowledge that volitionalism or individualism do seem to play some part in the Court's decisions but fail to offer by themselves a full or adequate account of the two cases. Again, we gladly acknowledge the likely presence of other factors in the cases, but maintain only that volitionalism is also one necessary element in any fully textured explanation. Still other readers, however, might further maintain that these other factors offer an adequate account in themselves and that volitionalism has nothing to do with the cases. We will now examine a few of these alternative interpretations and suggest that they are incomplete without a recognition of the Court's volitionalism.

One likely alternative account of *Bowen* and *Lyng* might suggest that the Court's real concern was proximate causation. As a practical matter, we must create some limit on how far causation can be traced from a governmental action to a perceived harm. Otherwise, governmental regulations would be responsible for all consequences in American society, and the public and private spheres would collapse into each other. In the chains of causation diagrammed earlier,[250] the governmental regulation in *Sherbert* directly caused the limit on individual conduct, whereas those in *Bowen* and *Lyng* directly caused a religious effect, which then caused a limit on conduct. This greater causal distance in *Bowen* and *Lyng* animated the Court's refusal to recoguize nonvolitionalist burdens.

Depending on its details, this interpretation suffers from at least two flaws. First, it may rest on the notion that causation is an objective, natural chain of events that can be described with reference to some pseudo-physical "law of causation." According to this view, the harms in *Bowen* and *Lyng* are objectively farther from the government action than the harm in *Sherbert*. But such a view iguores the point that any chain of causation can analytically be broken down into any number of stages. Indeed, if invisible events such as desecration of a sacred mountain site or psychological trauma are to count as separate causal stages, free exercise causal sequences are even more malleable than most tort claims, which at least involve observable physical events.[251]

Thus, if it is to be intellectually coherent, "proximate cause"

250 *See supra* notes 149-51 and accompanying text.

251 Thus, we might locate an additional stage in the *Sherbert* sequence: the government action caused Mrs. Sherbert anguish because it put her to a choice, and that anguish in turn limited her individual conduct. Under this rendition of the causal sequence, *Sherbert* and *Bowen* both involved one causal step between regulation and the limit on conduct.

must refer not to some "objective" chain of causation, but to policy concerns. We might want to limit liability for a variety of familiar reasons, and those reasons determine what it means for an event to be a "proximate" cause. Using this perspective, a reference to "proximate cause" only begins the analysis. By itself, it does not explain why the Constitution should draw the causal cutoff where *Bowen* and *Lyng* do, rather than at some other point. And the reason that the Court gives for drawing the line at this point is that the Constitution adopts a metaphysical "frame of reference" in which government actions cannot have inherent religious significance. Thus, the proximate cause rendition of the two cases only supplements the volitionalism account. The Court might have conceived of its holdings as placing a limit on causation—but the reason that it chose its particular limit is volitionalism.[252]

A second account of the two cases might argne that they simply limited cognizable burdens to de jure, rather than de facto, impositions on individual behavior. De jure burdens are those created by laws that facially regulate the particular activity that gives rise to the religious effect. The burden is de jure because it facially regulates individual behavior, but it need not facially refer to the fact that the behavior is religiously charged.[253] A de facto burden, by contrast, is any regulation that pressures a believer to forgo a religious practice but does not facially refer to the practice. Thus, bulldozing a shrine in a cathedral would not facially forbid pilgrimages by volitionalists but would de facto make them impossible.[254]

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252 One reason to cut the causal sequence off at Roy's claim—a reason that the Court did not give—is that when regulations "non-ascriptively" burden conduct, the Court can be certain that the regulations do impose some limits on individual activity without relying on the believer's own statements, because the limits on conduct do not arise from an idiosyncratic spiritual effect ascribed by the believer to the government's action. Apparently the Justice Department interpreted *Lyng* in this way. It argued that *Bowen* required an "objective" burden, one that does not depend on religious significance idiosyncratically ascribed to government action by the believer. Brief for Petitioners at 30, Lyng v. Northwest Indian Cemetery Ass'n, 485 U.S. 439 (1988).

Even in a *Sherbert*-style claim, however, the causal sequence is not in fact wholly secular or "objective." A court must still assess the sincerity of the believer's claim that the facial regulation of conduct will have a negative religious effect in order to determine whether there is a burden on free exercise. If the Supreme Court could ascertain that Sherbert genuinely believed that Saturday is a holy day of rest, it could also ascertain whether Roy genuinely believed that a social security number will rob his daughter of spiritual power. *Cf.* Lupu, *supra* note 5, at 962 (recoguizing the danger posed by *Bowen* and *Lyng* to the *Sherbert* line of cases).

253 Thus, *Yoder* presented a de jure prohibition: on its face, the law specifically stated that certain forms of behavior would not be allowed. Similarly, *Sherbert* involved a de jure penalty: the law expressly put the believer to a choice between government benefits and a particular named behavior. Neither law specifically referred to the fact that the burdened behavior was religiously significant for some persons.

254 *See* L. TRIBE, *supra* note 209, § 14-13 (describing a closely analogous distinction).

The Court has expressly recognized only de jure burdens and avoided recognizing or rejecting de facto burdens.[255] The de jure theory of *Bowen* and *Lyng* would explain the two cases as simply restricting protection to de jure claims. In neither of those cases did the challenged statute facially refer to the religious behavior of the individual claimant. In *Bowen*, the statute referred only to the government's internal use of the social security number, not to Little Bird of the Snow's spiritual growth. In *Lyng*, the regulation referred only to the construction of a road, not to the pilgrimages of the Indians. The Court's distinction between statutes that govern "internal government procedure" and those that burden "individual conduct" might turn on whether the statute facially refers to government activity or individual activity. Under this alternative interpretation, the Court would recognize de jure and not de facto claims whether or not they are volitionalist.

This interpretation of the cases, however, also suffers from two flaws. First, the Court did not discuss de jure and de facto burdens; rather, it referred to metaphysical "frame[s] of reference."[256] Second, regardless of the Court's langnage, the de jure theory cannot completely explain the results of the two cases, because *Bowen* and *Lyng* confined recoguition not just to de jure claims but to de jure *volitionalist* claims. For example, Roy's claim presented a type of de jure burden. The statute facially regulated the activity that directly gives rise to religious effects for the individual, the government's own use of the social security number. Granted, the de jure burden fell on the government's behavior, not on the individual's. But, for a nonvolitionalist, the government's behavior may have as much religious siguificance as his own. A nonvolitionalist could therefore recoguize a de jure claim whether the facial regulation falls on "interual governmental procedure" or "individual activity" because in either case, the law facially regulates activity with inherent religious significance.

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255 The Court's failure to take a position on de facto claims may be due to the fact that it has encountered so few of them. Braunfeld v. Brown, 366 U.S. 599 (1961), which upheld Sunday closing laws against a free exercise challenge, may be the only clear instance in which the Court was faced with a de facto volitionalist burden. In that case, the closing laws created a severe economic hardship for Sabbatarian merchants, who were forced to close on Sunday by law and on Saturday by their religion. The Court refused to recoguize this hardship as a constitutional burden, and one might argue that the Court thereby implicitly rejected de facto burdens. Indeed, such an explanation would serve to distinguish *Braunfeld* from *Sherbert*, which many have believed inconsistent with the earlier case. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 417-18 (1963) (Stewart, J., concurring). But the Court did not explain its holding in *Braunfeld* in these terms, and *Sherbert* may well have overruled *Braunfeld*. For these reasons, we believe that the Court has not yet clearly spoken on the coguizability of de facto volitionalist burdens.

256 *Bowen*, 476 U.S. at 701 n.6.

Proponents of this account of the cases might argue that the only de jure claims worthy of constitutional protection are those that facially regulate individual activity. A de jure claim by definition, *is* de jure regulation of individual behavior, not de jure regulation of all religiously charged behavior. But as with the causation theory, this answer is incomplete because it does not specify why de jure claims should be so confined. If the free exercise clause neutrally protects all believers, then the clause should recoguize de jure burdens on all religiously siguificant activity. Under the de jure account, the Court must believe that the clause does not neutrally protect all believers because it blocks only those laws that facially regulate individual behavior. Thus, it protects only those religions (volitionalist/individualist) that attribute religious siguificance to individual activity. This response, then, is simply a reassertion of the view that the Constitution's "frame of reference" favors those claims that ascribe inherent religious siguificance to individual activity and not to government activity.

E. Conclusion

Taken together, then, *Lyng* and *Bowen* express a judgment by at least a majority of the Court that a bias in favor of volitionalist beliefs is compatible with religious liberty. Indeed, under the *Lyng* standard, the Constitution not only allows but requires discrimination in favor of such beliefs because the document itself adopts a volitionalist perspective. The Court seemed to believe that the whole constitutional scheme of individual autonomy rests on a particular view of the relationship between individual and government activity—one in which the individual does not believe that government conduct has any inherent moral or religious meaning for him. The Court insisted on using this frame of reference to determine whether facially neutral laws, as applied, burden religious practice. To paraphrase Henry Ford, the believer could have any religion he wanted—as long as it was volitionalist. *Lyng*, however, lasted only a few years before the Court restricted still further the protections extended to religious practice. The meaning and genesis of this further restriction derived in significant part from the Court's volitionalist bias.

SECTION FOUR.
THE COURT'S DEFINITION OF A "BURDEN": *SMITH*

Last Term, in a dramatic reversal of over twenty-five years of precedent, the Court held in *Employment Division, Department of*

Human Resources v. Smith[257] that the free exercise clause extends no protection to any religious practice against generally applicable laws.[258] It thereby superficially removed the discrimination against nonvolitionalist claims imposed by *Lyng* by reducing the protection extended to volitionalist claims to the same level as that extended to nonvolitionalist ones. However, even in this apparent equalization, the Court revealed its volitionalist bias. The core of its argument is a parade-of-horribles argument that the Court took seriously only after confronting nonvolitionalist claims. Further, the Court serenely contemplated the likelihood that as a result of its decision, minority religions would suffer at the hands of the majority. Perhaps the most likely candidates for such treatment are those that embrace nonvolitionalist beliefs, beliefs that are so unconventional that even the Court has yet to understand them.

A. The Holding

Alfred Smith and Galen Black are members of the Native American Church which holds as one of its sacraments the ingestion of peyote.[259] Oregon law prohibits the ingestion of this drug.[260] When Smith and Black were discharged from their jobs at a private drug rehabilitation center for using peyote, they applied to the state department of human resources for unemployment compensation. The State refused them compensation on the grounds that they had been dismissed for work-related misconduct.[261] Smith and Black challenged the denial and, after a tortuous procedural history, arrived in the Supreme Court, which denied their claim in a five-four opinion.[262]

Writing for the majority, Justice Scalia first observed that if the State could prohibit the use of peyote, it could certainly deny unemployment compensation because of the use of peyote.[263] Therefore, the central issue in the case was the validity of the general criminal law outlawing peyote.[264] In upholding the law, the Court drastically restricted the applicability of the compelling state interest

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257 110 S. Ct. 1595, *reh'g denied*, 110 S. Ct. 2605 (1990).

258 As we discuss below, the holding may not be quite so broad: the Court might continue to apply stricter scrutiny to noncriminal laws or to general laws that provide for individualized consideration of particular cases. *See infra* notes 265, 268 and accompanying text. To the extent that a loophole exists, *Lyng* and *Bowen* presumably still apply within its ambit. Thus, the Court is still committed to a formally discriminatory position against nonvolitionalist religious practices.

259 *Smith*, 110 S. Ct. at 1597-98.

260 *Id.* at 1597.

261 *Id.* at 1598.

262 *Id.* at 1598-99.

263 *Id.* at 1598.

264 *Id.*

test, but the extent of the restriction is somewhat unclear. At the beginning of his opinion, Scalia distinguished the law in *Smith* from that in *Sherbert* by asserting that Sherbert's conduct was not "prohibited by law."[265] A state, in other words, may criminally forbid certain behavior and may then condition benefits on abstention from that behavior, but it may not condition benefits on behavior that it has not so prohibited. In *Lyng*'s terminology, the state may engage in direct but not indirect coercion. That conclusion, however, seems so counter-intuitive that one is inclined to search for a different reading of the case.[266]

Such a reading is not hard to find. The majority repeatedly distinguished between general neutral laws and those that "ban . . . acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display."[267] A law that prohibits peyote use by members of the Native American Church, in other words, would be very different from the Oregon general ban on peyote ingestion.

Later, the Court distinguished *Sherbert* on the grounds that the unemployment law in that case contained a mechanism for "individualized governmental assessment"[268] to determine whether an applicant had refused work for good cause. In cases "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[269] Each decision whether to grant or deny compensation was thus a particularized determination, targeted on the individual applicant, of whether a religious motivation constitutes good cause. The Court hinted that it might limit *Sherbert* to such cases, but concluded that it would in no event extend *Sherbert* to "across-the-board criminal prohibition[s] on a particular form of conduct."[270] Indeed, the Court apparently decided that such facially neutral laws should receive no scrutiny at all: having de-

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265 *Id.*

266 As Justice O'Connor noted, "a neutral criminal law prohibiting conduct that a State may legitimately regulate is, if anything, *more* burdensome, than a neutral civil statute placing legitimate conditions on the award of a state benefit." *Id.* at 1611 (O'Connor, J., concurring). Scalia himself observed: " '[I]f a state has prohibited through its criminal laws certain kinds of religiously motivated conduct . . . , it certainly follows that it may impose the lesser burden of denying unemployment compensation benefits to persons who engage in that conduct.' " *Id.* at 1598 (*quoting* Employment Div., Dep't of Human Resources v. Smith, 485 U.S. 660, 670 (1988)). In other words, if a state directly coerces a behavior, it may then indirectly coerce as well. In *Sherbert*, by contrast, the state *indirectly* coerced without first *directly* coercing. But Scalia never explains *why* a state must first directly coerce before it is allowed indirectly to coerce.

267 *Id.* at 1599.

268 *Id.* at 1603.

269 *Id.* (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)).

270 *Id.*

cided that *Sherbert* did not apply to them, the Court perfunctorily upheld the law without further analysis.

Justice Scalia denied that *Smith* changed the law in any significant way, but it is plain that *Smith* is a real revolution in the field. As Justice O'Connor's concurring opinion points out at length,[271] Scalia's characterization of precedent is less than admirable in its honesty.[272] *Sherbert*, in particular, was not limited to statutes that contained provisions for individualized exemptions. Rather, as Scalia himself agreed only three Terms before, that case applied whenever the government forced a believer to " 'choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.' "[273]

Scalia himself conceded that the Court had applied the compelling state interest standard to "analyze free exercise challenges" to "across-the-board criminal prohibitions."[274] But, he insisted, "we have never applied the test to invalidate" such a law, instead finding a compelling state interest in every such case.[275] In fact, that characterization of precedent is also incorrect; the Court had struck

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271 *Id.* at 1607-10 (O'Connor, J., concurring).

272 Since O'Connor's opinion provides most of this analysis, we sketch here only the most dramatic of these mischaracterizations. The majority relied on language in Minersville School District v. Gobitis, 310 U.S. 586 (1940), without noting that West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943), had effectively overruled it. *Smith*, 110 S. Ct. at 1600. It cited Braunfeld v. Brown, 366 U.S. 599 (1961), without recalling that *Sherbert* had substantially recharacterized that case. *Smith*, 110 S. Ct. at 4435; *see supra* note 116. The majority described United States v. Lee, 455 U.S. 252 (1982), Gillette v. United States, 401 U.S. 437 (1971), and Prince v. Massachusetts, 321 U.S. 158 (1944), as upholding a neutral law against challenge without noting that in each case the Court had first applied strict scrutiny. *Smith*, 110 S. Ct. at 1600. However, the *Smith* opinion later did concede that *Lee* and *Gillette* had applied the heightened standard. *Id.* at 1608. Apparently with no other option, Scalia dubbed Wisconsin v. Yoder, 406 U.S. 205 (1972), and Cantwell v. Connecticut, 310 U.S. 296 (1940), as "hybrid" cases involving free exercise rights in combination with other constitutional protections—parental and speech rights. *Smith*, 110 S. Ct. at 1602. Both cases, however, described the conduct as protected by the free exercise clause without finding it necessary to rely on any other provision. See *Yoder*, 406 U.S. at 219-29; *Cantwell*, 310 U.S. at 303-07. Finally, the majority maintained that "in recent years" the Court had avoided any reliance on *Sherbert* except for the unemployment context. *Smith*, 110 S. Ct. at 1603 (citing Goldman v. Weinberger, 475 U.S. 503 (1986), O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987), *Bowen*, and *Lyng*). But in those earlier cases the Court had expressly limited *Goldman* to the military context, *see* 475 U.S. at 507, *O'Lone* to the prison context, and *Bowen* and *Lyng* to internal government conduct, plainly assuming that these cases were exceptions to the general *Sherbert* rule, not the rule to which *Sherbert* was an exception. For a detailed critique of the *Smith* opinion on these and other grounds, see Michael W. McConnell, *Free Excercise Revisionism and the* Smith *Opinion*, 57 U. CHI. L. REV. 1109 (1990).

273 *See* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 140 (1987) (quoting Sherbert v. Verner, 374 U.S. 398, 404 (1963)).

274 *Smith*, 110 S. Ct. at 1603.

275 *Id.*

down a number of sucb laws. More importantly, however, it is irrelevant to the question of whether *Smith* is an instance of the Court's new activism. As O'Connor observed, "it is surely unusual to judge the vitality of a constitutional doctrine by looking to the win-loss record of the plaintiffs who happen to come before us."[276] The Court used to apply strict scrutiny to facially neutral laws; it no longer does so. That change is a dramatic departure from precedent.

B. The Continuing Volitionalist Bias

At first glance, this change seems to equalize the treatment of volitionalist and nonvolitionalist religions. Before *Bowen*, the Court professed to treat all religions the same by protecting them from burdens caused by neutral laws. After *Bowen* but before *Smith*, the Court would extend that protection to volitionalist but not to nonvolitionalist religions; but after *Smith*, the Court would extend such protection to no one. True, the net result is a loss of religious liberty for everyone, but at least everyone is in the same sinking boat.

Indeed, Scalia implicitly relied on a notion of equal treatment to defend the holding in *Smith*. Quoting from *Lyng*, he insisted that the government's ability to enforce its laws " 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.' "[277] O'Connor responded by observing that *Lyng* applied only to internal goverument actions, which pose no burdens because in Justice Douglas's words, the free exercise clause is " 'written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the goverument.' "[278]

Scalia countered by maintaining that the internal/exterual distinction makes no sense. In terms of practical effects, the goverument action in *Sherbert* was no different from the ones in *Bowen* and *Lyng*:

> [S]ince Justice Douglas voted with the majority in *Sherbert*, that quote obviously envisioned that "what the government cannot do to the individual" includes not just the prohibition of an individual's freedom of action through criminal laws but also the running of its programs . . . in such fashion as to harm the individual's religious interests.[279]

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276 *Id.* at 1610 (O'Connor, J., concurring).

277 *Id.* at 1603 (quoting *Lyng*, 485 U.S. at 451).

278 *Id.* at 1612 (O'Connor, J., concurring) (quoting Sherbert v. Verner, 374 U.S. 398, 412 (1963)).

279 *Id.* at 1603 n.2.

And Scalia could see no reason to draw the distinction:

> [I]t is hard to see any reason in principle or practicality why the government should have to tailor its health and safety laws to conform to the diversity of religious belief, but should not have to tailor its management of public lands, *Lyng*, . . . or its administration of welfare programs, *Roy*.[280]

The *Lyng* or *Bowen* Courts could have offered such a reason: the Constitution adopts a volitionalist frame of reference that does not recognize inherent religious significance to the government's actions. Scalia now apparently regards such a privileging of one frame of reference as unprincipled, so *Lyng* must rest on the broader idea that the free exercise clause ignores all burdensome effects of general laws, not just "internal" ones. Roy might find it ironic that a majority of the Court would reject his perspective in order to deny him protection, but then adopt his perspective in order to deny protection to others. Even so, this shell game results in less discrimination as well as less protection. The Court seems hostile to all religions claiming special protection, not just nonvolitionalist ones.

On closer inspection, however, *Smith* offers reason to believe that the Court's volitionalist bias is necessary to explain even its apparent equalization of religious claimants. The majority's central argnment for ignoring the effects of neutral laws was that to do otherwise would invite anarchy and government paralysis:

> To make an individual's obligation to obey [a generally applicable] law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"—permitting him, by virtue of his beliefs, "to become a law unto himself," —contradicts both constitutional tradition and common sense. . . .
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> . . . Any society adopting such a system would be courting anarchy.[281]

Significantly, the Court viewed that risk as especially grave in a diverse nation:

> [T]hat danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," . . . and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest

280 *Id.*

281 *Id.* at 1603, 1605 (citations omitted).

order.[282]

The majority then reeled off a number of parade-of-horribles challenges that had been brought against facially neutral laws.

This argument may or may not justify overruling *Sherbert*, but it is not a new argument for doing so.[283] Thus, the question of timing becomes important: why did the parade-of-horribles argument suddenly become persuasive? The answer seems apparent on the face of the Court's language: the danger of disorder becomes acute in a diverse nation. The Court had nightmare visions of strange religions arriving in court to shackle the government with bizarre demands. The animus behind the decision, in other words, was a fear of marginal religions; behind the apparent neutrality lurks a discriminatory mindset.

The Court, moreover, quite bluntly admitted that its new rule will disproportionately hurt minority religions, but insisted that allowing them to suffer is better than giving them protection at the expense of order. In the Court's words, "[i]t may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself."[284] As long as the Court had conventional claimants like Sherbert before it, the danger of government disruption seemed unimportant. As soon as some truly non-mainstream plaintiffs arrived, government flexibility and order seemed critical.

And yet Sherbert herself was hardly a member of a mainstream religion; she belonged to that litigious and outspoken group, the Jehovah's Witnesses. Why did the Court find the Indian claimants in *Bowen* and *Lyng* so threatening by contrast? Native Americans might answer: precisely because they were Indians. And surely it is no coincidence that the plaintiffs in all three cases were Native Americans.[285] The Court, moreover, denied not only Roy's nonvolitionalist claim but later Smith's volitionalist challenge as well. Thus, if one were looking for common threads, one might focus more on the race of the claimants than on their belief system. Yet race alone will not account for the sequence of decisions. For

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282 *Id.* at 1605 (quoting Braunfeld v. Brown, 366 U.S. 599, 606 (1961)).

283 *See supra* text accompanying notes 220-48.

284 *Smith*, 110 S. Ct. at 1606.

285 Nor is it a coincidence that the Court decided *Lyng*, *Bowen*, and *Smith* at the same time that it substantially restricted Native American rights of self-determination. *See, e.g.*, Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 109 S. Ct. 2994 (1989) (restricting tribal jurisdiction over non-Indians on Indian country); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) (expanding state jurisdiction over non-Indians on Indian country).

one thing, Justice O'Connor would still maintain the distinction between external and internal action, as presumably would Justices Brennan, Marshall, and Blackmun, at least as *Bowen* formulated it.[286] They would all deny protection to some Indian religions but accord protection to others. The religion-protective wing of the Court thus retains its volitionalist bias.

But what about the other wing of the Court? Perhaps it is fairer to say that they are fearful not of nonvolitionalist religions but of Indian religions or of all religions that need protection from the legislature. Here, it is important to remember that the destruction of *Sherbert* occurred in stages. Peyote cases had been in the courts for years. Indeed, the right of Native American Church members to ingest the drug was one of the first applications of *Sherbert*.[287] Yet the Court never took action on any of these cases,[288] apparently believing that the analogy to Sherbert's claim was accurate.

Only when the Court adjudicated nonvolitionalist Indian claims did the parade-of-horribles argument become convincing, and then for a particular reason: A broad application of *Sherbert* might allow believers to invade the government's ability to conduct its "own affairs," to manage its "own land." The Court realized the potential reach of the case when it began to contemplate the possibility that nonvolitionalists would unreasonably want to interpret government action in their own peculiar frame of reference.

Having looked into that frightening future, the Court apparently found the *Sherbert* rule fraught with very different implications. But *Bowen* and *Lyng* drew an inherently unstable line—at best, confusing, and at worst, discriminatory. Once the Court started down the path of restricting protection, it just continued, reading *Lyng* to extend to volitionalist claims as well. The Court has thus arrived at a formally nondiscriminatory position but the etiology of that position is saturated with volitionalist bias.

Yet on further analysis, even the Court's final position is not, in fact, so nondiscriminatory. The protection remaining to believers after *Smith* still makes the most sense in a volitionalist framework. First, the majority would still extend absolute protection to belief, but the scope of the protection reveals the Court's continuing voli-

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286 Justices Brennan, Marshall, and Blackmun joined the result in *Bowen* and dissented in *Lyng* without wishing to overrule *Bowen*.

287 The classic exposition is People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964). Courts also found for Native American Church members in Peyote Way Church of God, Inc. v. Smith, 742 F.2d 193 (5th Cir. 1984), and Whitehorn v. State, 561 P.2d 539 (Okla. Crim. App. 1977).

288 Indeed, in at least one case finding for Native Americans, the Court denied a writ of certiorari. State v. Whittingham, 19 Ariz. App. 27, 504 P.2d 950 (1973), *cert. denied*, 417 U.S. 946 (1974).

tionalist bias. Since belief is an internal occurrence, government may reach it only by regulating external events—and it may do so in one of two ways. First, laws may govern belief by using conduct, typically public statements, as evidence of belief, and then punishing the believer on the basis of those statements. The second method is best exemplified by the sacred land cases. Belief for the Indians depends on events in the physical world, such as the existence of a sacred mountain. If the mountain ceases to exist in its pristine form, so does the freedom to believe in the effect of the mountain. Thus, the government may regulate belief by changing the factual predicates for belief.

These two methods correspond to two different types of belief. The second rests on a nonvolitionalist type of belief: one's capacity to believe is directly dependent on events outside one's control, like the existence of a sacred mountain.[289] The first method of regulating belief derives from a volitionalist view: penalties for public profession force the believer to a crisis of conscience by making her choose between going to jail or losing benefits, on the one hand, and foreswearing or keeping silent about deeply held beliefs on the other. But no events in the world other than penalties can affect her faith. Belief is entirely a matter of will. The volitionalist must hold fast to her faith and to stand witness to it. No material alteration of the world should even be relevant to that task.

The *Smith* Court forbade only the volitionalist method of regulating belief—punishing belief through its public expressions. The Court described the right as "the right to believe and profess whatever doctrine one desires."[290] It listed a series of burdens, all characterized by the pressure that they level directly at the believer to change her views or at least its public manifestations: "The government may not compel affirmation of religious belief, . . . punish the expression of religious doctrines it believes to be false, . . . impose special disabilities on the basis of religious views or religious status, . . . or lend its power to one or the other side in controversies over religious authority or dogma."[291] None of these recognize the nonvolitionalist possibility that the government may burden an individual's belief by altering the natural world, the behavior of other persons, or its own behavior.

Second, the Court will still extend constitutional protection against statutes that facially or intentionally discriminate against religious practices. In both kinds of discrimination, the key to heightened scrutiny seems to be the government's intent, as op-

289 *See supra* text accompanying notes 72-91.
290 *Smith*, 110 S. Ct. at 1595.
291 *Id.* at 1599 (citations omitted).

posed to the effect of the law. This view comports with the Court's growing proclivity in other areas to see evil not in laws that in fact restrict protected activities but only in laws that the government intends to restrict those activities.[292] This conviction may derive from a volitionalism focused not on the believer but on the government. The Constitution's "frame of reference" is such that the Court will strike down only those laws for which the legislature's intention may be blamed. That conclusion is by no means inevitable. In guaranteeing individual rights, the Constitution might seek to establish a range of practical freedoms, not praise or censure the legislature through upholding or striking down its acts. But the Court's volitionalist stance seems to be so acute that it insists on casting the question into one of legislative moral accountability for its actions and freeing it from accountability for all unintended consequences.

In the view of the *Smith* Court, however, the primary source of protection for religious practices is plainly not the Constitution at all, but the legislature. As noted previously, the Court rather complacently accepted the probability that minority religions will disproportionately suffer in this process of legislative "accommodation"; it knew and did not care. Probably all minority religions will suffer to some extent from the new regime, volitionalist and nonvolitionalist alike. Surely no legislature will enact a ban on the consumption of wine such that Catholics will be unable to celebrate the Mass, but many have banned the use of peyote. Nonetheless, as the culture is so pervasively volitionalist, nonvolitionalists may suffer most systematically at the hands of legislatures. Like the Court itself, few legislators will even understand the religion; of those that do, many will feel only indignation at the idea that the believers have any legitimate interest in the government's "own business."

In short, then, a volitionalist bias pervades even the Court's new, formally nondiscriminatory position. For the time being, the legislatures bear the responsibility of special protection for believers. There is little reason to expect that nonvolitionalists will fare any better in that forum. But even though the legislature need not extend special protection to religious practice, its range of options is not constitutionally unlimited. The Court explained that legislatures may grant special treatment to believers and predicted that at least some would:

> Just as a society that believes in the negative protection accorded

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292 Indeed, Scalia explicitly makes this connection, maintaining that the Court must find a discriminatory intent before it will exercise heightened scrutiny under the equal protection clause or the first amendment's speech component. *Id.* at 1604 n.3. *See generally* Susan Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615 (1991) (describing the proclivity noted in the text).

> to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well. It is therefore not surprising that a number of States have made an exception to their drug laws for sacramental peyote use. . . . But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required.[293]

The legislatures have thus gained a new freedom. They may or may not grant special treatment to religious practice. But that freedom is limited: whatever special treatment they do grant must be "nondiscriminatory."

Smith, in other words, overturns *Sherbert* by allowing states to decide how much protection should be extended to religion, but it does not touch the rule associated with *Larson v. Valente*,[294] that the state may not discriminate among religions by protecting some more than others, without a compelling state interest. The Court has never clearly explained how it would engage in measuring the comparative protection accorded different religions.[295] Since it is likely that the legislatures will grant some exemptions under the new regime, it becomes even more important that the Court remain vigilant in insisting on impartiality. If an omnibus drug and alcohol statute contained an exemption for sacramental wine but not sacramental peyote, for example, the Court would presumably find a prima facie violation.

But by the same token, the legislature should not be able to grant protection to volitionalists and deny it to nonvolitionalists. It could not, for example, give Sherbert a special right not to work on Saturday but deny Roy's demand that the government not use a social security number to refer to his daughter—without a compelling state interest. Nor could it grant exemptions for Catholics from the alcohol statute, from certain tax laws,[296] and from labor laws,[297] but

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293 *Smith*, 110 S. Ct. at 1606.

294 456 U.S. 228, *reh'g denied*, 457 U.S. 228 (1982).

295 In *Larson*, for example, the Court struck down a state law exempting from the requirements of the state's Charitable Solicitation Act only those religious organizations that received more than half of their total contributions from their members. The exemption, according to the Court, favored " 'well-established churches' that have 'achieved strong but not total financial support from their members.' " *Id.* at 1685 n.23 (quoting Valente v. Larson, 637 F.2d 562, 566 (8th Cir. 1981)). On the other hand, the Court upheld, for example, tax exemptions for church real property, without noting that the statute facially discriminated between two sets of religious organizations—those that have property and those that do not. *See* Walz v. Tax Comm'n, 397 U.S. 664 (1970).

296 Mueller v. Allen, 463 U.S. 388 (1983), upheld a state scheme that allowed parents to deduct expenses associated with private schooling from their gross income in computing their income tax.

deny the Indians' request that their sacred sites remain undisturbed.

It seems very likely, however, that the legislatures will do all of these things—and that the Court, *á la Bowen* and *Lyng*, will casually uphold such a discriminatory scheme. The Court, indeed, would in all likelihood repeat its position that the Constitution's own "frame of reference" supports a distinction between internal and external government action. Even under the Court's new, less formally discriminatory position, then, the lingering bias of the Court and legislatures will likely result in nonvolitionalists receiving less religious freedom than volitionalists. Part II of this Article will therefore address and refute the Court's central contention—that the Constitution and the concept of religious liberty rest on a volitionalist world view.

PART II: THE ARGUMENT AGAINST VOLITIONALISM AS A THRESHOLD REQUIREMENT

To modern legal sensibilities formed in the prevailing culture, volitionalism may seem the only defensible moral or religious system. The Constitution, moreover, may well endorse volitionalism in many of its political provisions. Finally, as we will suggest, many of the framers—Madison and Jefferson among them—believed in a species of volitionalism both as a personal religious belief and as an explanation for why the Constitution protects religious beliefs and practices. As a result, modern judges may presume that the Constitution guarantees liberty to the practice of volitionalist religions alone, and indeed that religious liberty itself depends on a volitionalist view. They may conclude, furthermore, that if the Constitution itself discriminates against nonvolitionalists, surely legislatures may do so by granting special treatment only to volitionalist religions.

This conclusion is mistaken: the frame of reference of the religion clauses—as distinct from the Constitution generally—does not exclude nonvolitionalist views from protection. We base this contention on the three standard sources of constitutional law: the language of the clauses, the history of their adoption, and the policies identified by the Court as underpinning them. In doing so, we do not mean to attribute any particular significance to these three sources. Rather, we intend to refute the Court's assertion in *Bowen*

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297 *Cf.* Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) (holding that the ban on religious discrimination contained in the Civil Rights Act of 1964 does not extend to the secular nonprofit activities of religious organizations); NLRB v. Catholic Bishop, 440 U.S. 490 (1979) (holding that the National Labor Relations Act does not apply to lay employees of church schools).

and *Lyng* that the "frame of reference" of the free exercise clause—as defined by the Court's own conventional sources—is exclusively volitionalist.

The language of the free exercise clause—"Congress shall make no law . . . prohibiting the free exercise [of religion]"[298]—offers little guidance. It certainly contains no suggestion that only certain kinds of religion are to receive its protection.[299] Indeed, the general reference to "religion" suggests that the clauses were meant to protect the free exercise of all religions. As we have already argued,[300] the term "prohibit" could refer either to nonvolitionalist prohibitions or volitionalist ones; the Court can restrict the term to the latter only by importing volitionalist assumptions from outside the text.[301]

The Court presumably derives its constitutional "frame of reference," not from the language of the free exercise clause, but from the theoretical framework that it believes undergirds the Constitution. The following sections will consider the primary sources for this framework: the history of the document's adoption and the policies that underlie it. First, we will argue that the framers of the first amendment meant to include within its protection clearly nonvolitionalist religions—in particular predestinarian Calvinists, who played as important a role in the adoption of the clause as did their better-known volitionalist allies. Second, we will argue that the policies of the free exercise clause identified by the Supreme Court—neutrality and voluntarism—warrant extending protection to nonvolitional claims. In at least one earlier case, *Wisconsin v. Yoder*,[302] the Court seemed to recognize this argument. In general, then, legislatures and courts must extend nonvolitionalist religions

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298 U.S. CONST. amend. 1.

299 The clause does extend protection only to the "free exercise" of religion. On the face of it, this phrase may suggest that the clause protects only religious practice, that is, only the conduct of individuals or groups of individuals. Even if this reading of the language is correct—and the Supreme Court has implicitly rejected it by extending protection to belief as well as practice—it does not follow that the free exercise clause protects only volitionalist religions. Nonvolitionalist religions, like volitionalist religions, may involve discrete religious practice, and the government may interfere with that practice in nonvolitionalist ways. Thus, the government's use of the social security number may destroy Little Bird of the Snow's ability to heal; or its construction of a ski resort in the mountains may effectively prevent the Hopis from summoning the Kachinas.

300 *See supra* text accompanying notes 220-48.

301 The Court's only other linguistic argument is its claim that the free exercise clause "is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government." Bowen v. Roy, 476 U.S. 693, 700 (1986) (quoting Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)). As we have already demonstrated, however, this argument cannot support a volitionalist reading of the clause.

302 406 U.S. 205 (1972).

the same level of protection enjoyed by others. Finally we will consider whether and when the special attributes of nonvolitionalist religions justify treating them differently because the state has a compelling interest in doing so.

We will conclude that the Constitution's frame of reference allows neither courts nor legislatures to discriminate between volitionalist and nonvolitionalist religions. Whatever degree of protection the government extends to one, it must extend to the other. On the other hand, protection for some nonvolitionalist practices may prove excessively disruptive to the government. In these cases, the government may decline to protect such practices and still protect others—not because they are volitionalist but because they less severely disrupt the government's secular activities.

SECTION FIVE.
THE ARGUMENT FROM HISTORY

The Supreme Court and commentators have often maintained that the views of those responsible for the adoption of the first amendment—especially Thomas Jefferson and James Madison—are significant to its interpretation.[303] Thus, when the Court insisted that the Constitution adopts a volitionalist "frame of reference," it may have meant that Madison and Jefferson intended that result. As a personal system of belief, the two framers did, indeed, adopt a volitionalist religious scheme: the essence of religion was the practice of virtue so as to earn a reward in Heaven. Moreover, they based their defense of religious liberty on the assumption that religion is volitionalist: individuals reserve the right to religious freedom from the social contract so that they may be free to please God (or Providence) and win a reward for their conduct. Because of the dominance of Madison and Jefferson, the Court may have assumed that volitionalism was the sole religious theory embraced by the framers' generation.

In fact, however, the modern American tendency to equate religion with volitionalism is primarily a product of the nineteenth century. For the century and one-half preceding the drafting of the Bill of Rights, the principal orthodox theology of the colonies was nonvolitionalist predestinarian Calvinism. In this belief system, human choices have no religious effect. God alone chooses individuals for salvation, uninfluenced by their attempts to save themselves. By the time of the ratification of the Constitution, this kind

303 *See, e.g.*, School Dist. v. Schempp, 374 U.S. 203, 214 (1963); Everson v. Board of Educ., 330 U.S. 1, 8-13, *reh'g denied*, 330 U.S. 855 (1947); Reynolds v. United States, 98 U.S. 145, 162-64 (1878), *overruled on other grounds*, Thomas v. Review Bd., 450 U.S. 707 (1981).

of Calvinism had come under attack from volitionalist Arminian theologians, yet it retained the loyalty of a substantial portion of the American public.

In light of this history, the contention that the framers intended to exclude nonvolitionalist views from constitutional protection is insupportable. It is highly implausible that Jefferson and Madison meant to exclude the Calvinist denominations—Presbyterians, Congregationalists, and many of the Baptist groups—from protection, since some of those denominations were among the most mainstream and respectable in the nation, and others were Jefferson's and Madison's most important allies in the battle for religious freedom.

Even if the Constitution should be interpreted according to the intent of those who brought about its adoption, the views of Madison and Jefferson should not constitute the entire foundation for interpreting the free exercise clause. Madison and Jefferson were not alone responsible for its adoption[304]—Calvinist supporters of the clause offered a nonvolitionalist defense of religious freedom, best articulated in the writings of Isaac Backus. Among the promoters of religious liberty, Calvinists may well have been most responsible for its adoption into state and federal constitutions. Nonvolitionalism therefore has a significant place in the first amendment's origins alongside volitionalism.

A. The Volitionalism of Madison and Jefferson

The framers most often associated with the drafting of the religion clauses, James Madison and Thomas Jefferson, were volitionalist in their approach to religion and religious liberty. Their personal religious beliefs inclined to rationalist Deism—an emphatically volitionalist position.[305] Adherents of this view maintained that all es-

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304 Indeed, as we will suggest, attributing only one metaphysical explanation to the religion clauses—such as that of Madison and Jefferson—conflicts with establisbment clause values. *See infra* text accompanying notes 582-89.

305 Jefferson's Deism is universally recognized. *See, e.g.*, HENRY MAY, THE ENLIGHTENMENT IN AMERICA 293 (1976); SIDNEY MEAD, THE LIVELY EXPERIMENT 41 (1963). Madison rarely discussed his personal religious beliefs, so it is more difficult to discern them with any certainty. He probably held essentially Deistic beliefs, although perhaps not as extreme as those of his friend Jefferson. *See* IRVING BRANT, JAMES MADISON: THE VIRGINIA REVOLUTIONIST 118, 277 (1941); Ralph Ketcham, *James Madison and Religion—A New Hypothesis*, 38 J. PRESBYTERIAN HIST. SOC'Y 65, 65, 71-72 (1960). Madison was, however, more pessimistic than the Deists regarding human nature and the cosmic order—perhaps as a result of his early training under the Presbyterian Divine John Witherspoon. *See* Ketcham, *supra*, at 86; James Smylie, *Madison and Witherspoon, Theological Roots of American Political Thought*, 22 PRINCETON U. LIBR. CHRONICLE 118, 128-29 (1961). On the other hand, Madison and Witherspoon shared the belief that God delivered to man a code of morals, to which humans are accountable through their capacity for virtuous action. *See* RALPH KETCHAM, JAMES MADISON, A BIOGRAPHY 46-47 (1971); H. MAY, *supra*,

sential religious truths are accessible to natural reason, unaided by special revelation and unfettered by the superstition that they associated with institutional religion.[306] The truths so revealed are simple and few:[307] God exists and is to be worshipped; the worship of God consists of the practice of virtue;[308] and there exists a future realm of reward and punishment.[309] Religion is, in other words, fundamentally a divinely sanctioned set of moral rules binding on man. The essential religious activity is the exercise of an undetermined will to follow those rules, so as to earn future reward.[310] Not surprisingly, many Deists believed that the chief function of religion

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at 62-63. Moreover, Madison, unlike Witherspoon, probably shared the Enlightenment belief in the perfectibility of humankind. He thus denied the doctrine of original sin, the basis for the nonvolitionalism of predestinarian Calvinists. *See* Ketcham, *supra*, at 86. Most importantly for present purposes, Madison probably believed in the capacity of humans freely to choose the right. *See infra* note 314. Any limited extent to which Madison inclined away from Deism and toward a nonvolitionalist belief, such as Calvinism, directly supports our general thesis that the free exercise clause extends to nonvolitionalist religions.

306 *See* S. MEAD, *supra* note 305, at 44-50; Edwin Gaustad, *A Disestablished Society: Origins of the First Amendment*, 11 J. CHURCH & ST. 409, 419-24 (1969). For evidence that Jefferson and Madison shared this view, see *infra* notes 312-21 and accompanying text.

307 Benjamin Franklin and Thomas Jefferson provided the clearest and most concise list of these features of Deist religion. *See* BENJAMIN FRANKLIN, AUTOBIOGRAPHY (Mod. Libr. C. ed. 1981) (1st ed. 1818); THOMAS JEFFERSON, *Notes on Religion, 1776* [hereinafter T. JEFFERSON, *Notes on Religion*], in 2 WRITINGS OF JEFFERSON 94 (1893) [hereinafter WRITINGS I]; THOMAS JEFFERSON, *Letter to Dr. Benjamin Rush, with a Syllabus (Apr. 21, 1803)*, in THOMAS JEFFERSON: WRITINGS 1125-26 (1984) [hereinafter WRITINGS II]; THOMAS JEFFERSON, *Letter to Benjamin Waterhouse (June 26, 1822)* [hereinafter T. JEFFERSON, *Letter to Benjamin Waterhouse*], in 10 WRITINGS I (1899), *supra*, at 219.

308 Jefferson maintained that he was a *"real Christian"* for the simple reason that he followed the ethical teachings of Jesus. THOMAS JEFFERSON, *Letter to Charles Thomson (Jan. 9, 1816)* [hereinafter T. JEFFERSON, *Letter to Charles Thomson*], in WRITINGS II, *supra* note 307, at 1373 (emphasis in original). One of Jefferson's life-long projects was to separate the actual sayings of Jesus from the comments of his chroniclers in the New Testament. When he did so, he discovered that Jesus's sayings constituted the finest code of morals known to man, whereas the commentators had added the metaphysical mysteries that infected the various Christian sects. *See, e.g.*, THOMAS JEFFERSON, *Letter to Dr. Joseph Priestley (Apr. 9, 1803)*, in WRITINGS II, *supra* note 307, at 1120, 1121; THOMAS JEFFERSON, *Letter to John Adams (Oct. 12, 1813)*, in WRITINGS II, *supra* note 307, at 1300, 1301-02.

309 *See* H. MAY, *supra* note 305, at 295.

310 Many Deists condemned the Biblical stories in which God visits hardships on individuals for reasons unrelated to their own failings, such as the misery of Job, the punishment of Adam, and the Crucifixion itself, which involved the sacrifice of one man for the sins of others. *See id.* at 21-22.

Deism is thus volitionalist in the "milder sense": the essential religious activity is choosing to follow the rules, but natural justice rather than choice defines the content of these rules. *See supra* text accompanying notes 27-30. Indeed, Jefferson and Madison emphasized that the rules are so self-evident to reason or the moral sense that individuals cannot but recognize their morally obligatory quality. *See* THOMAS JEFFERSON, *Notes on the State of Virginia*, in WRITINGS II, *supra* note 307, at 285; Ketcham, *supra* note 305, at 67-69, 71-72 (influence of Samuel Clarke's rationalist theology on Madison); *infra* text accompanying notes 312-13, 319-20. *See generally* JAMES TURNER, WITHOUT GOD, WITHOUT CREED: THE ORIGINS OF UNBELIEF IN AMERICA 35-72 (1985) (discussing broad ap-

was the maintenance of peace, morality, and good order.[311]

More importantly for present purposes, Jefferson and Madison not only held this view of religion privately, but also based their defense of religious liberty on it. The chief elements of this defense are the same for both Madison and Jefferson. First, even before he enters the social contract, natural reason reveals to each individual that he owes a duty to God and what that duty entails. This duty rests on a volitionalist view of the self: each individual is under a duty because he can freely choose to live up to the divine obligations perceived by reason. When the individual enters the social contract, he cedes some powers to the government but reserves certain spheres of autonomy, including religion. Individuals choose to retain autonomy in this area because they owe a duty to God, and each individual is alone responsible before the court of Heaven for the choices that he has made in this life. Therefore, because his duty to God takes precedence over his duty to the state, the jurisdiction of the state cannot reach religious practice.

Madison's *Memorial and Remonstrance* presents this argument in standard Deistic fashion. The *Memorial* begins by insisting that reli-

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peal of rationalism and moralism and the connection between the two in seventeenth-century America).

For purposes of argument and brevity, we have conceded that Jefferson and Madison were volitionalist. In fact, however, neither Jefferson nor Madison were unambiguously volitionalist even in this milder sense. Jefferson's views on the matter are complex and somewhat unclear. Methodologically, he believed that some form of materialist determinism provided the best guide for scientifically understanding pbenomena in the world; this view would suggest that men do not possess any meaningful free choice. *See* ADRIENNE KOCH, THE PHILOSOPHY OF THOMAS JEFFERSON 94-104 (1943); H. MAY, *supra* note 305, at 118, 294. But he also refused to take a position on materialism as a metaphysical question, to maintain systematically that individuals are in fact chained by materialist determinism. *Id.* Moreover, his religious views were highly moralistic (indeed he tended to identify religion and morality), *see supra* note 308, and he excoriated the Calvinists for their determinism, *see infra* note 377. Madison, too, found determinism a logically compelling position, but ultimately denied it on the grounds that even if determinism is the only defensible position on logical grounds, it has no support in human experience. Human beings experience undetermined choice as real, and therefore it exists. *See* R. KETCHAM, *supra* note 305, at 46-47; *see also* Edmond Cahn, *Madison and the Pursuit of Happiness*, 27 N.Y.U. L. REV. 265, 270-71, 275-76 (1952) (arguing that Madison and Jefferson, borrowing from Locke, both believed that wills are partially materialistically determined by different desires but that humans can choose discriminatingly among desires).

Even if Madison and Jefferson were not volitionalists, they were plainly individualists: their conviction that God rewards and punishes necessarily involves the claim that the religious fate of each individual depends on what that individual does or does not do. For this reason, they would part company with the Indians on the idea that the government's actions can have inherent religious significance for individuals.

311 *See, e.g.*, S. MEAD, *supra* note 305, at 44, 59-60. Deists disagreed over the wisdom of religious liberty precisely because they disagreed on whether religion was necessary to the social order. Jefferson believed that the existing American religions adequately promoted social order, so that persecution added to social disorder rather than reducing it. *See* T. JEFFERSON, *supra* note 310, at 286-87.

gious belief can be influenced only by reason and not by coercion.[312] Furthermore, the *Memorial* implicitly maintains that the religious truths identified by reason consist of a code of behavior, a set of divine rules: Madison directly identifies "Religion" as "the duty which we owe to our Creator and the manner of discharging it," and that duty "of every man [is] to render to the Creator such homage and such only as he believes to be acceptable to him."[313] The word "duty" implicitly suggests that the essential religious activity is volitionalist. Without the capacity for free will, at least in the context of Madison's and Jefferson's presuppositions, we could not be under a genuine duty to do something we have not the freedom to choose to do.[314]

Finally, and most significantly, Madison derives the principle of religious liberty from this volitionalist view of religion: the state has no jurisdiction over religion because the duty to God "is precedent, both in order of time and in degree of obligation, to the claims of Civil Society."[315] Implicitly, this argument draws on Madison's broader social contractarian philosophy.[316] In this familiar scheme,

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312 James Madison, *To the Honorable General Assembly of the Commonwealth of Virginia, Memorial and Remonstrance*, in JAMES MADISON ON RELIGIOUS LIBERTY 56 (1985) [hereinafter RELIGIOUS LIBERTY] (" 'Religion . . . can be directed only by reason and conviction' ") (quoting Virginia Declaration of Rights, art XVI (1776)).

313 *Id.*

314 This implication of the word "duty"—that we have the capacity through undetermined will to live up to our obligations—is not unavoidable. Predestinarian Calvinists, for example, believed that we are under a duty to God that we cannot, by our own efforts, satisfy. *See infra* note 393. For Deists such as Madison and Jefferson, however, duty implied free will. Both Madison and Jefferson believed that we have the capacity for undetermined choice and thereby implicitly denied the Calvinist view of duty. *See supra* note 310 and text accompanying notes 313-14. Jefferson, in particular, waxed eloquent in his denunciations of Calvinism as cruel and tyrannical because it imposed a duty while denying the free will to fulfill the duty. *See infra* note 377. Similarly, Madison maintained that only the free choice of humans to fulfill their duty could please God:

> "If the public homage of a people can ever be worthy of the favorable regard of the Holy and Omniscient Being to whom it is addressed, it must be that in which those who join it are guided only by their free choice, by the impulse of their hearts and the dictates of their conscience."

Donald Drakeman, *Religion and the Republic: James Madison and the First Amendment*, 25 J. CHURCH & ST. 427, 441 (1983) (quoting 1 JAMES D. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 533 (1901)).

315 RELIGIOUS LIBERTY, *supra* note 312, at 56.

316 The argument also implicitly refers to Locke's *Letter Concerning Toleration*, with which Jefferson and Madison were almost certainly familiar. *See* Robert Rutland, *James Madison's Dream: A Secular Republic*, in RELIGIOUS LIBERTY, *supra* note 312, at 203 (arguing for Madison's familiarity with the *Letter*); T. JEFFERSON, *Notes on Religion*, *supra* note 307, at 99-103 (reproducing portions of the *Letter* verbatim but without attribution).

Locke's defense of religious liberty is not unproblematically volitionalist. Locke believed that individuals would choose contractually to withhold religion from civil jurisdiction, because each individual owes a duty to God, *see* JOHN LOCKE, A LETTER CONCERNING TOLERATION 18-19 (2d ed. 1977), but those choices are in large part determined. For Locke, passion determines judgment, and judgment determines the will;

individuals suffer legitimate consequences only as a resnlt of their choices. Government can be based only on individual consent, or at least assent, so the power of the government reaches only those activities confided to it in the social contract. Individuals choose to enter the contract to effect their own ends, but they also choose to exempt certain spheres of autonomy from the contract.[317] Individuals choose to retain religious autonomy because each owes a duty to God, a duty precedent "in time and in degree of obligation" to his civil obligations to the state. Religious exercise is exempted from the civil covenant because we are responsible for our own acts to God.[318]

In various works, Jefferson mirrors these ideas. In his original, unedited version of the *Bill for Establishing Religious Freedom*, he maintained that religious truths were available to "reason alone."[319] And for Jefferson as for Madison, reason reveals that the essence of religion is conduct calculated to win salvation. In early notes, echo-

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individuals cannot will other than they will. They can, however, suspend choice while they rationally consider all the possible objects of desire. Because salvation is the greatest good, rational beings will always choose to uphold their duty to God. *See, e.g.*, NORMAN FIERING, JONATHAN EDWARDS'S MORAL THOUGHT AND ITS BRITISH CONTEXT 288-89, 296-97 (1981); Raymond Polin, *John Locke's Conception of Freedom*, in JOHN LOCKE: PROBLEMS AND PERSPECTIVES 2-5 (J. Volton ed. 1969). Thus, choices provide the only legitimate basis for political or religious consequences, but the choices are self-determined only in a limited sense. *But see* Cahn, *supra* note 310, at 271 (emphasizing the capacity for self-determination inherent in Locke's thought). Again, however, Locke is, at a minimum, individualist: only the actions of each individual, even if those actions are nonvolitional, can have legitimate consequences for that individual. *See* Polin, *supra*, at 11. As a result, he too would disagree with the Indian belief in the inherent religious significance of government action.

317 As many have noted, the social contract is not based on actual choices of real individuals but on the choices that "reasonable persons" would make at the mythic origin of the polity. What these hypothetical individuals give up (rights in the state of nature), why they give it up ("reasonable persons" would always prefer civil society), and what they gain (a state bound by the social contract) are all artificial constructs based on some substantive view of natural justice, as in the case of Locke, or human nature, as in the case of Rawls. *See* MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 105-06 (1982); Polin, *supra* note 316, at 10, 13. In this sense, the terms of the contract are set not by human choice, but by God or natural law or some other source of standards of justice. Importantly, however, the contractarians rhetorically defend the legitimacy of the state not on the grounds that God or natural law directly ordained the state in a certain way, but that individuals—however highly abstracted—chose to form the state, for their own ends, in accordance with these standards of justice. Thus, for the contractarians, choice legitimates the state.

318 Rationalist Deism is the religious correlate of social contractarianism, in that both derived from a single metaphysic: individuals suffer legitimate consequences—moral, political or religious—only as a result of their choices. One apparent difference does exist between the two ideas. Deism is volitional in the "milder sense": individuals are held accountable for their chosen failure to abide by the rules, but they do not choose the rules. Social contractarianism is volitional in the "stronger sense": individuals actually choose the fundamental rules, at least rhetorically, in making the contract.

319 THOMAS JEFFERSON, *A Bill for Establishing Religious Freedom*, in WRITINGS II, *supra* note 307, at 346.

ing Locke's *Letter Concerning Toleration* almost verbatim, Jefferson defined a church as a "voluntary society of men" into which an individual enters for the "hope of salvation" because he believes—presumably by the use of his natural reason—that the church's mode of worship is "acceptable to [God] and effectual to the salvation of [his] soul[]."[320] Again, the view of religion is volitionalist: human beings are rewarded for choosing to live up to the duty of worship and punished for not doing so. And again, the defense of religious liberty is based on this view of religion: the right to regulate worship is exempted from the social contract because the people "have not given [the magistrate] the care of souls because they could not; they could not, because no man has the right to abandon the care of his salvation to another."[321]

On first observation, then, the Court's view that the Constitution incorporates a volitionalist "frame of reference" seems to have an impressive pedigree. The reason that Jefferson and Madison proffered for religious liberty is that we have a religious duty to follow God first and the state second. Remove this duty—remove the volitionalist responsibility to render the Creator homage—and one has removed the reason offered by Jefferson and Madison for religious liberty. Nonvolitionalist religions thus have no place within the Constitution's scheme of liberty. Despite its initial plausibility, however, this argument is ultimately insupportable. To demonstrate why, we turn to a description of nonvolitionalist religions in colonial America.

B. Calvinism in Colonial America

Although volitionalism has been an important strain in Western

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320 T. JEFFERSON, *Notes on Religion*, *supra* note 307, at 101.

321 *Id.* The preamble to Jefferson's *Bill for Establishing Religious Freedom*—in which Jefferson laid out his reasons for the Bill—is concerned with freedom of opinion and the closely related freedom to maintain one's opinion by argument. As a result, the preamble to the Bill does not directly defend the liberty of general religious practice. The preamble's defense of the freedom of public argument, however, itself suggests a volitionalist view of religion and a volitionalist defense of religious liberty. The Bill maintains that freedom to promote a religious view in public is a natural right, for the typically Jeffersonian reason that free discourse is the best way to promote truth. *See* T. JEFFERSON, *supra* note 319, at 347. But for Jefferson, public profession of one's religious views is also a religious duty: Jefferson condemns as "criminal" those who succumb to the "temptation" of receiving worldly honors in exchange for denying their true beliefs. The Bill also maintains that those "who lay the bait in their way"—*i.e.*, those governors who condition worldly emoluments and honors on foreswearing beliefs—are "not innocent." *Id.* Again, then, the defense of liberty of argument is derived from religion's volitionalist nature: the state should not subject the believer to a weighted choice between a governmental benefit and his duty to maintain his beliefs in public, because his religious fate depends on the free choice to fulfill his religious duties. Thus, as regards belief claims, Jefferson mirrors the present Court's position. *See supra* text accompanying notes 289-91.

Christianity, it is by no means the only one. Nonvolitionalism has played an important part in Christian theology at least since Augustine of Hippo's response to Pelagius in 416.[322] More importantly for the history of the first amendment, nonvolitionalism lay at the center of the theological construct of John Calvin, the greatest single influence on colonial American religion.

Calvin anchored his analysis to two concepts: the absolute sovereiguty of God and the utter depravity of man. Because He is absolutely sovereign, Calvin asserted, God alone chooses which individuals will be saved by grace. Man plays no part in this salvific process because his depraved will is bound to sin.[323] As a result, God chooses the elect without reference to merit, for reasons that may seem arbitrary to human notions of justice.[324] Thus, Calvin proclaimed free will a fiction and announced that doctrine so unsettling to moderu Protestants: predestination. The causal sequence for this predestinarian description of the salvific process[325] is nonvolitionalist: Calvin vehemently denied the sequence, Individual Action —> Religious Effect, and proposed instead, God's Action —> Religious Effect.[326]

Despite its insistence that man cannot save himself, Calvinism nevertheless gave a prominent place to human action in the process of salvation, because God sometimes acted through individuals. Calvin maintained that the reception of grace—the process of justification—will lead naturally to upright behavior—the process of sanctification. Once individuals have received grace, their hearts turn

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322 The British monk Pelagius maintained that humans have the capacity to please God and do His will on their own initiative. Augustine, who maintained that without God's help humans are always caught in the snare of self-love, condemned Pelagianism as heresy. *See* ELAINE PAGELS, ADAM, EVE, AND THE SERPENT 98-100, 105-06, 129-30 (1988).

323 *See* 1 JOHN CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION 238-39, 265 (John Allen trans. 7th Amer. ed. 1936).

324 *Id.* at 274, 286, 2 *id.* at 191-92.

325 Calvin believed that man's will was bound not only in the process of salvation but in "corporeal" matters as well. 1 *id.* at 282-84. Thus, Calvin endorsed a fairly thorough going determinism that later Calvinists would abandon until Jonathan Edwards revived it in the eighteenth century. *See infra* text accompanying notes 356-61.

326 The text addresses how man is saved but not how man is damned because the process of salvation concerned colonial theologians much more than the process of damnation. Calvin himself and many Calvinists believed that God originally imbued Adam with free will and that Adam's free choice to sin doomed the rest of mankind. *See* 1 J. CALVIN, *supra* note 323, at 181. After the Fall, individuals sin voluntarily, in the sense that their natures incline them to sin and so they choose to sin. They do not sin freely, however, because they are bound to sin. *See id.* at 284-85. Thus, even after the Fall, man is responsible for his damnation because he voluntarily sins. *Id.* at 285-86. This responsibility is nonvolitionalist. Man is responsible because he sins, not because he has a choice about whether to sin. Thus, negative religious effects, like positive ones, are not the product of free will.

naturally to God, so that they gladly do good works.[327] But human choice plays no role in this process. Good works and a willing heart are a result, not a cause, of grace; and whatever is good in man is attributed entirely to the indwelling presence of God.[328] The causal sequence is again nonvolitionalist: God's Action (election) —> Religious Effect (justification) —> Individual Action (sanctification).

In short, Calvinist predestinarianism conceded that a good deal of human activity occurred in the working out of God's plan of salvation, but it could never be the cause of salvific effects. This distinction is rather a subtle one, and from the beginning, Calvinists seemed in constant danger of crossing the line from predestinarianism into volitionalism.[329] In the early seventeenth century, Jacobus Arminius and his followers within the Reformed Church of Holland stepped over that line.

Arminius maintained that God knows in advance who will be saved and who will not, but He does not predestine them irrespective of their choices. Instead, He offers conditional election to all: He will offer grace to every individual, but grace is not irresistible; sinners may freely accept or reject grace when it is offered. In this way, human choice became a necessary cause of salvation.[330] In the Synod of Dort of 1618, the Reformed Church of Holland condemned conditional election and Arminianism as heresy.[331]

With the ascension of the Stuarts in England, the English Church under Archbishop Laud adopted Arminianism as its official creed. For this reason among others, strict Calvinists within the Anglican Church felt compelled to emigrate to New England.[332]

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327 *See* 2 *id.* at 10-11.

328 *See* 1 *id.* at 266-70; 2 *id.* at 12, 23-24.

329 Factors which may account for the tendency of Calvinist groups to ahandon or modify predestinarian doctrines include the innate human desire to control one's own destiny, and the rise of rival volitionalist ideologies and practices, such as liheralism and capitalism. The most famous explanation is Max Weber's hypothesis that the anxiety induced by predestination caused individuals to seek in rigorous self-control signs of election, such that self-control and spiritual election became identified. *See* MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 111-118 (T. Parsons trans. 1958).

330 *See* JOHN MCNEILL, THE HISTORY AND CHARACTER OF CALVINISM 263-65 (1954); NORMAN PETTIT, THE HEART PREPARED 125-27 (1966); WILLIAM SWEET, RELIGION IN COLONIAL AMERICA 190 (1942).

331 *See* J. MCNEILL, *supra* note 330, at 265; N. PETTIT, *supra* note 330, at 127. The Synod formulated the famous Five Points of High Calvinism: unconditional election, limited atonement, total depravity, irresistible grace, and the perserverance of the saints. *Id.* Each of these points was deeply predestinarian: God did not condition election on human choice; Christ's atonement would save only the elect few; man after the Fall is utterly depraved and so cannot help himself; grace, when it comes, cannot be resisted by human will; and God will so preserve his saints that once saved they cannot fall away.

332 *See* H. MAY, *supra* note 305, at 14; EDMUND MORGAN, THE PURITAN DILEMMA 28-31 (1958); W. SWEET, *supra* note 330, at 20-21. The original emigrants to New England

The Calvinist settlers themselves exhibited tendencies toward both Calvinist predestination and a timid Arminian volitionalism.[333] But this dual tendency should not obscure the fact that at base, the New England colonies were deeply Calvinist. All of the early settlers denounced Arminianism as heresy.[334] The vast majority, moreover, were consistent in their belief in certain Calvinist tenets such as human inability to achieve salvation without the assistance of divine grace,[335] and the understanding that God may grant grace for reasons of His own to the most unrepentant evil-doer yet deny it to the most upright citizen.[336] In this sense, the New England Puritans were resolutely nonvolitionalist.

A group of New England divines, however, sought to soften the rigors of strict predestinarianism by giving man a limited role to play in his own salvation. Preachers such as Thomas Hooker, Thomas Shepard, and Peter Bulkeley maintained that man can and should prepare himself for the reception of grace. Conversion, in the view of these preparationists, is not God's sudden seizure of the individual, but rather a series of steps. God first warms the soul through the "means of grace"—baptism, preaching, and the biblical promise of salvation in exchange for man's faith.[337] After this divine initiative, the individual must cooperate with God through an "affective response," usually acute self-analysis, in order to engender an awareness of sin and a yearning for grace.

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came seeking the liberty to practice a nonvolitionalist creed, in flight from the prevailing volitionalism of the English church. *Bowen* thus resurrected the same orthodoxy from which the Puritans fled.

Later, while fleetingly in control of the Church of England, English Puritans promulgated the Westminster Confession of 1648, which adopted the substance of the Synod of Dort as the definitive explanation of the relationship between man and God. The Westminster Confession became the standard of orthodoxy by which all Puritan theological analysis would be judged, both in England and America, and Armimianism became the most feared Calvinist heresy. *See* H. MAY, *supra* note 305, at 14; J. MCNEILL, *supra* note 330, at 325-26; E. MORGAN, *supra*, at 136-37; W. SWEET, *supra* note 330, at 104-05.

333 *See* JAMES JONES, THE SHATTERED SYNTHESIS ix (1973).

334 *See* E. MORGAN, *supra* note 332, at 136.

335 *See* N. PETTIT, *supra* note 330, at 19.

336 *See* PERRY MILLER, *The Marrow of Puritan Divinity*, in ERRAND INTO THE WILDERNESS 93-97 (1956) [hereinafter ERRAND].

337 The most famous form of preparationism was covenant theology, which proclaimed that God made a promise to each individual to save him, if he would have faith. This covenant rhetorically offered some solace for the anxious Calvinist by giving him a way to work toward his salvation: if the individual had faith, God would grant him grace. The hope was only rhetorical, because most covenant theologians believed that the individual could not acquire faith by his own initiative any more than he could acquire grace. God required man to have faith to fulfill the covenant, but only God could give faith. The covenant of grace was thus, in truth, a covenant that God made with himself. *See* P. MILLER, *supra* note 336, at 71-74; EDMUND MORGAN, ROGER WILLIAMS: THE CHURCH AND THE STATE 13-14 (1967).

The preparationists differed as to the sense in which this response was a product of human volition. Most believed that God must not only offer the means of grace, He must also create the response in the breasts of humans, so that humans cannot even contribute to their own salvation.[338] Peter Bulkeley alone went somewhat further in giving man a role: God infuses in man the "habit of faith" by baptism, after which man must of his own volition engage in "acts of faith" in order to secure salvation. Thus, the human acceptance of God's invitation completes the process.[339] With the exception of Bulkeley,[340] then, humans play a part in salvation but only under God's control. God alone provides the means of grace and engenders the salvific response to them.

Preparationist doctrines often became ambiguous as they sought to ascribe some important causal role to man's "affective response" while avoiding the Arminian heresy.[341] To many, preparationism seemed little more than disguised Arminianism.[342] The Antinomians[343] mounted the first attack on preparationism on this basis. Preparationists, the Antinomians claimed, believed in a covenant of works, in which man fulfills the contract with God by good deeds, rather than a covenant of grace, in which man fulfills the contract with God only when God provides grace.[344] The Hutchin-

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338 For example, Thomas Shepard maintained that faith was a necessary precondition of grace, but that God alone could fulfill that condition by giving man faith. *See* J. JONES, *supra* note 333, at 8-9; N. PETTIT, *supra* note 330, at 111-12. Similarly, Thomas Hooker believed that while man must become painfully aware of his own sinfulness before he can receive grace, God alone can grant man this awareness, can alone connect the "means" of grace with grace itself. *See* J. JONES, *supra* note 333, at 12-13; N. PETTIT, *supra* note 330, at 91-92, 95-96.

339 *See* J. JONES, *supra* note 333, at 9, 21, 72-73; N. PETTIT, *supra* note 330, at 117-18, 123.

340 Even Bulkeley emphasized that the habit of grace, induced by an unconditional promise of salvation, is the result of free grace. *See* N. PETTIT, *supra* note 330, at 120-21.

341 *See id.* at 113; P. MILLER, *supra* note 336, at 74; E. MORGAN, *supra* note 332, at 136.

342 *See* P. MILLER, *supra* note 336, at 84; E. MORGAN, *supra* note 332, at 136-37; W. SWEET, *supra* note 330, at 101. There is a difference, however tenuous, between Arminianism and preparationism: Arminianism maintained that God offers grace to all, and that all are free to accept, whereas preparationists believed that man cannot accept the covenant without God's help. For preparationists, therefore, God elects the saints without regard to merit. *See* P. MILLER, *supra* note 336, at 84 & n.143.

343 The Antinomians were a small group of Puritans located in New England. They were led by Anne Hutchinson and inspired by the preaching of John Cotton, who took the doctrines of free grace and divine sovereignty to extremes. The Antinomians maintained that after the Holy Ghost had entered the human breast, its directions supplemented or substituted for the teachings of scripture; that good behavior did not always follow justification, so that works were not evidence of grace; and that the spirit within the individual could allow him to discern who was saved, without reference to works. *See* E. MORGAN, *supra* note 332, at 138-39. The colony was briefly divided over the Antinomian controversy, but Antinomian beliefs virtually disappeared following their condemnation in 1637. *See id.* at 140-54.

344 *See id.* at 139-40; N. PETTIT, *supra* note 330, at 141, 146-47.

sonian Synod of 1637, however, condemned the Antinomians as heretics for denying man any role in salvation, and for a time preparationism became part of New England orthodoxy. Unlike the Antinomians, the elders at the Synod maintained that God works through and in men in salvation, rather than merely upon them. But they also carefully insisted that preparation was a work of God, not man. Individuals did participate in their own salvation, but only as tools in God's hands.[345] Thus, even the Synod's position, which was the high point for preparationism as doctrinal orthodoxy, was fundamentally nonvolitionalist.

The theological future of New England, however, lay with an even more nonvolitionalist view, propounded by the intellectual heirs of John Cotton. Cotton's preaching had inspired the Antinomians, and he supported the movement throughout most of its short life. Although he differed with the Antinomians on many points,[346] Cotton agreed that conversion is an instantaneous forceful seizure of the depraved soul by God. The individual can only wait passively for faith, without preparing for it.[347] Even the claim that God works through men gave them too large a role in their salvation: God works upon men, as upon lumps of lifeless clay.[348] After the Hutchinsonian Synod, Cotton no longer maintained this view in public, in an effort to avoid theological disunity.[349]

In the 1650s, however, John Norton's became the dominant theological voice in the colony.[350] The line between preparationism and Arminianism had always seemed very thin, even to some preparationists,[351] and Arminianism in the 1640s became the greater threat to Massachusetts orthodoxy. To answer the threat, Norton vigorously reasserted God's direct and absolute sovereignty, and denied preparation any regenerative efficacy. Conversion occurred in a single moment, the instant of election, and consisted

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345 *See* J. JONES, *supra* note 333, at 7, 12; N. PETTIT, *supra* note 330, at 147-55.

346 Cotton condemned two Antinomiam beliefs in particular: their insistence that divine illumination of the individual could supersede Scripture; and their denial that before giving grace, God convinced sinners of their sinfulness by showing them that they could never fulfill the demands of the divine law on their own. *See* N. PETTIT, *supra* note 330, at 151-55.

347 *See* J. JONES, *supra* note 333, at 5-6; N. PETTIT, *supra* note 330, at 136-41.

348 *See* J. JONES, *supra* note 333, at 7-9.

349 *See id.* at 4; N. PETTIT, *supra* note 330, at 155-57.

350 *See* N. PETTIT, *supra* note 330, at 177-78.

351 The most famous example of the blurred distinction between preprationism and Arminianism was John Winthrop's written repudiation of the Antinomian position. Before publication, he sent it to Thomas Shepard for approval; Shepard responded that, although he did not doubt Winthrop's orthodoxy, a less sympathetic reader might find that the draft contained a number of Arminian errors more grievous than Antinomianism itself. Winthrop apparently destroyed the composition. *See* E. MORGAN, *supra* note 332, at 142; N. PETTIT, *supra* note 330, at 144-45.

exclusively of divine action;[352] all man's attempts to prepare are only "painted sins."[353] Norton nevertheless urged all would-be saints to engage in preparatory activities to guard against excessive religious enthusiasm unconstrained by social norms.[354] This view of preparation—as both inefficacious and obligatory—became the dominant position for the next several decades.[355]

As time went on, however, many came to believe that the religious fervor of New England was yielding to a growing spirit of secularism. Conversion experiences, for example, occurred less often after New England congregations abandoned the requirement that individuals recite the details of their experience in order to become full church members. Many unregenerate New Englanders complacently attended on the means of grace with no present fear that God might never grant them grace. The region seemed to be moving yet again toward anthropocentric Arminianism, without a sense of the awful majesty and power of the Almighty.[356]

The Great Awakening, a series of religious revivals that swept across the colonies during the mid-eighteenth century, was a response to this perceived spiritual decline. On an emotional level, the Awakening reflected a felt need for a vital, consuming religious life, one filled with a sense of the immediate presence of God.[357] On a theological level, this need reflected itself in a Calvinism stricter than any the colonies had yet known.[358] Preparation, the means of grace, church discipline, covenant theology, all became suddenly peripheral if not condemned. The Awakening instead em-

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352 *See* J. JONES, *supra* note 333, at 10-13, 18-19, 22-24; N. PETTIT, *supra* note 330, at 182. Despite these forthright statements, Norton was at times ambiguous on the role of humankind in salvation. Although he always insisted that redemption was entirely a product of God's will, Norton seemed to suggest that God works through, rather than upon man: first God calls man, who is wholly passive, by infusing him with faith, but thereafter man actively participates in his own salvation. *See* J. JONES, *supra* note 333, at 20.

353 N. PETTIT, *supra* note 330, at 180.

354 *See* J. JONES, *supra* note 333, at 24-26; N. PETTIT, *supra* note 330, at 178-79, 181-82.

355 The Synod of 1662 officially adopted Norton's position, *see* N. PETTIT, *supra* note 330, at 198, and the Reforming Synod of 1679 entirely omitted mention of preparation. *See id.* at 203. Even Increase Mather and Solomon Stoddard, who agreed on little else, followed Norton on this subject. *See id.* at 204-05. Indeed, the Stoddard-Mather debate is remarkable in that both men, despite their ecclesiological differences, emphasized the utter helplessness of man and the dangers of Arminianism more emphatically than had the mid-century theologians. *See* J. JONES, *supra* note 333, at 78-83, 114-21.

356 *See, e.g.*, EDWIN GAUSTAD, THE GREAT AWAKENING IN NEW ENGLAND 12-15 (1965).

357 *See id.* at 97-99; RHYS ISAAC, THE TRANSFORMATION OF VIRGINIA 1740-1790, at 164-69 (1982).

358 *See* SYDNEY E. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 375 (1972); E. GAUSTAD, *supra* note 356, at 134-35; CHARLES LIPPY, SEASONABLE REVOLUTIONARY: THE MIND OF CHARLES CHAUNCY 32 (1981); H. MAY, *supra* note 305, at 54.

phasized two features of the spiritual life: the need for a sudden overwhelming moment of conversion when God takes forceful possession of the individual soul; and the utter helplessness of the individual to cause that experience.[359]

The Awakening split New England into two theological camps, a split that would never heal. Charles Chauncy, Jonathan Mayhew, Lemuel Bryant and others like them formed a liberal party based in Boston that emphasized the importance of rational knowledge and preparation in the regenerative process. Eventually, they openly embraced Arminianism and condemned as subversive of morality the Calvinist belief that human conduct cannot win divine approval.[360] On the frontier, Jonathan Edwards—America's most significant pre-twentieth century theologian—preached a Calvinism "pure and uncompromised."[361] Edwards left a deep Calvinist mark

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359 *See* ALAN HEIMERT, RELIGION AND THE AMERICAN MIND 37-39 (1966); C. LIPPY, *supra* note 358, at 30-32.

360 *See* A. HEIMERT, *supra* note 359, at 48-49, 54-55; C. LIPPY, *supra* note 358, at 27-28, 85; J. JONES, *supra* note 333, at 154-60; BRUCE KUKLICK, CHURCHMEN AND PHILOSOPHERS 25 (1985); H. MAY, *supra* note 305, at 55-58.

361 E. GAUSTAD, *supra* note 356, at 22; *see* P. MILLER, *supra* note 336, at 98; N. PETTIT, *supra* note 330, at 209. Edwards's vivid sermons emphasizing the inability of depraved man to help himself are still a familiar part of American culture, especially the famous passage from "Sinners in the Hand of an Angry God":

> O Sinner! Consider the fearful danger you are in: it is a great furnace of wrath. . . . You hang by a slender thread, with the flames of divine wrath flasbing about it, and ready every moment to singe it, and burn it asunder; and you have no interest in any Mediator, and nothing to lay hold of to save yourself, nothing to keep off the flames of wrath, nothing of your own, nothing that you have ever done, nothing that you can do, to induce God to spare you one moment.

B. KUKLICK, *supra* note 360, at 24.

In particular, Edwards developed the first rigorous argument in New England theology for thorough-going determinism, based on the inability of the will to choose other than as it in fact chooses. *See id.* at 34-39. Edwards distinguished between natural liberty—our physical ability to do as we please—and moral necessity—our inability to choose to please other than as we in fact please. Because of moral necessity, individuals can will only as their desires or motives move them to will. We cannot choose to have a different motive—to will to will—because that choice in turn must have a sufficient motive. Freedom, for this reason, consists only in having motives. Thus, because human desires are depraved and humans cannot change those desires on their own initiative, they can will only to sin. Their only hope is supernatural grace, which divinely alters their religious affections and so changes their motives. Edwards believed that his scheme was just, even to those punished for motives that they could not self-determine, because of the "theistic paradigms": just as Christ's actions are good, even though they are necessary, man's willing is evil even though it is necessary. Moral worth depends not on volition, but rather on the essence or substance of humans. *See* NORMAN FIERING, JONATHAN EDWARDS' MORAL THOUGHT AND ITS BRITISH CONTEXT 283-98, 305-08, 313-16 (1981); A. HEIMERT, *supra* note 359, at 76-77, 195-96; B. KUKLICK, *supra* note 360, at 34-39; Paul Helm, *John Locke and Jonathan Edwards: A Reconsideration*, 7 J. HIST. PHIL. 51, 51-53 (1969).

Edwards is sometimes classified as part of the voluntarist Calviuistic tradition. The theological term of art, "voluntarism," does not imply that man's choices have any reli-

on colonial theology that persisted well after his death, through his own writings and the school of thought that followed him, the New Divinity.[362]

Theological development in Virginia during this period followed a path similar to that in New England, although Southern analytical theology was less sophisticated than Northern. The early Virginia settlers adhered to a preparationist Calvinism that closely resembled the covenant theology of New England.[363] By the eighteenth century, however, Southern Anglicanism had embraced an Arminianism that emphasized the ability of natural reason to perceive religious truths, and human participation in salvation.[364] As in New England, religious fervor declined during these years. Also as in New England, although over a longer period of time, the Great Awakening subsequently swept the South with its call for an intense, personal experience of the presence of God in the life of each individual.[365]

With the exception of the Methodists, the evangelical groups making up the Southern Great Awakening were predestinarian Calvinists who dissented from the established Anglican Church because, *inter alia*, it was rife with Arminianism.[366] Calvinist Presbyterians created the first wave of evangelical piety from the 1730s to the 1740s and were to remain the most influential dissenting group throughout the constitutional period.[367] Calvinist Baptists set up a second, larger, and more vociferous wave that was substantially more disturbing to the establishment.[368] The third great wave, the

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gious significance. Rather, the voluntarist tradition maintained that God, in granting man grace, converts the will, and that this conversion results in a disposition to do good works. For the voluntarists, this disposition to do good and not the intellectual appreciation of religious truths, was the core of religious life. *See* N. FIERING, *supra*, at 299; A. HEIMERT, *supra* note 359, at 110; B. KUKLICK, *supra* note 360, at 33, 41; N. PETTIT, *supra* note 330, at 209-11.

362 *See* E. GAUSTAD, *supra* note 356, at 134-40; B. KUKLICK, *supra* note 360, at 43-65; H. MAY, *supra* note 305, at 49-50.

363 *See* PERRY MILLER, *Religion and Society in the Early Literature of Virginia*, in ERRAND, *supra* note 336, at 106-12, 120-21.

364 *See* S. AHLSTROM, *supra* note 358, at 199; DONALD G. MATHEWS, RELIGION IN THE OLD SOUTH 8-11 (1977).

365 *See* D. MATHEWS, *supra* note 364, at 12-14.

366 *See* THOMAS E. BUCKLEY, CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776-1787, at 9 (1977).

367 *See id.* at 12-13; R. ISAAC, *supra* note 357, at 146-54; D. MATHEWS, *supra* note 364, at 15-19.

368 *See* D. MATHEWS, *supra* note 364, at 22-23; R. ISAAC, *supra* note 357, at 162. The first Southern Baptists were the relatively sedate General Baptists, who were Arminian in tendency. In the 1750s missionaries from the Philadelphia Baptist Association reorganized most of these groups into Particular or Regular Baptists churches, which were Calvinist. S. AHLSTROM, *supra* note 358, at 317-18. The real flood came from the North in the 1750s and 1760s. Separate Baptists, Calvinist products of the New England Great Awakening, migrated south and achieved tremendous success at conversions while both

Methodist movement, was distinctly Arminian, and the future of American evangelism—indeed of American Christianity as a whole—belonged to Arminian theologies.[369] But in the 1770s and 1780s—the formative period for the thinking of Madison and Jefferson—Methodism was still an incipient movement, controversial for its unrepentant Arminianism, and in the shadow of predestinarian Baptists.[370] At the time of the first amendment's adoption, then, the situation in the South largely mirrored that in New England: a vocal, aggressive, numerous Calvinist backcountry confronted a relatively complacent, urban, Arminian elite with charges of worldliness and religious apathy.

C. Significance of the Existence of Colonial Calvinism for Interpreting Madison and Jefferson

This historical overview highlights four features of the development of colonial theology that are important for interpreting the views of Madison and Jefferson on religious liberty. First, throughout the colonial period, the central bone of theological contention concerned the role of human will, effort, and choice in the conversion process. Second, the colonies always contained a substantial number of strict predestinarians, who maintained that human choice had no religious effect and attacked all contrary views as heretical Arminianism. Third, for the whole colonial period, Calvinist groups were the most numerous denominations, and even though nominal Calvinists strayed into beliefs resembling Arminianism, these groups remained formally committed to strict predestinarianism. And finally, although Arminianism would soon sweep the new nation, in the 1770s and 1780s strict Calvinism was alive and well; indeed, it had recently received a boost from the mid-century evangelical movements.

Like the American Indian claims considered earlier, Calvinism ascribed primary religious effects to the activity not of individuals but of the cosmos. For strict predestinarians, ascribing significance to human choice denied the depravity of man and derogated from the sovereignty of God, who gives grace as He chooses without regard to merit and without human participation. After conversion, as a result of God's grace within them, the saints engaged in good works, but although they did so willingly and happily, their good behavior was God's work, not their own. All the primary religious

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the General and Particular Baptists held themselves aloof. *See id.* at 292-93, 318-20, 374-75; D. MATHEWS, *supra* note 364, at 25.

369 *See* D. MATHEWS, *supra* note 364, at 29-34; *infra* notes 421-25 and accompanying text.

370 *See* S. AHLSTROM, *supra* note 358, at 321-22; H. MAY, *supra* note 305, at 141.

effects on the individual are caused by a divine force beyond his control.

In this sense, predestinarian Calvinism is quite analogous to the nonvolitionalist elements of Indian religions. For both belief systems, the religious harm to the individual lies not in his own failure to live up to his obligations, but in occurrences in the divine sphere unrelated to his own activity: disruption of the cosmic harmony of the world, drowning of the gods, or divine denial of grace. In each case, disruption in the divine sphere causes limitations on individual religious activity. If the government were to cause such disruptions, its actions would create limits on individual religious activity in the believer's nonvolitionalist "frame of reference." In other words, if the Constitution contains a bias against nonvolitionalist religious harms like those claimed by the Indians, then it is also biased against the religious harms most central to colonial Calvinism.

In light of the history sketched above, Jefferson and Madison could not have intended to exclude nonvolitionalist religions from protection on the grounds that these religions ascribed no significance to human choice. In the 1780s, the central theological line dividing believers was precisely the role of human will in salvation. For Jefferson and Madison to have incorporated a volitionalist "frame of reference" in the free exercise clause would have been to set up a creedal orthodoxy precisely designed to disqualify strict Calvinists and to throw the weight of the government permanently behind one side of the religious debate. Under these circumstances, a first amendment that privileged volitionalist religions would hardly promote the stated goal of Madison's *Memorial and Remonstrance*[371]—equal religious liberty for all—or of Jefferson's *Bill Establishing Religious Freedom*[372]—the free and open debate of religious ideas.

Moreover, unlike many today, Jefferson and Madison did not blithely equate religion and volitionalism or assume that nonvolitionalist religions were a small and unimportant fringe group. Their awareness of the significance of the predestination debate should be inferentially apparent: both were acute social observers in a century torn by this issue. But more direct evidence exists for their awareness. Madison's and Jefferson's principal allies in the battle for religious liberty, both in the South and in New England, were Calvinist evangelicals.[373] Having accepted the aid of Calvinists, it is hardly likely that Jefferson and Madison should then turn about and draft a document biased against them. Further, Madison's lifelong disgust

371 *See* Madison, *supra* note 312, at 56.
372 *See* T. JEFFERSON, *supra* note 319, at 346.
373 *See infra* notes 383-85 and accompanying text.

with religious persecution was first kindled when he witnessed the legal punishment of a Calvinist minister.[374] Madison could hardly have intended to become the persecutor at the same moment that he was striving to correct the persecution. And Jefferson, in one of his early discussions of religious liberty, first carefully distinguishes Arminian and Calvinist beliefs about human will,[375] and then poses a rhetorical question: "Suppose for instance two churches, one of Arminians another of Calvinists in Constantinople, has either any right over the other?"[376] The intended answer obviously is no.

Jefferson and Madison must thus have meant to extend religious liberty to nonvolitionalist predestinarians. And yet their defense of religious liberty was markedly nonpredestinarian: each individual reserves the right of religious freedom because each is responsible for procuring his own salvation by living up to his divine obligations.[377] If the Calvinist soul cannot choose to live up to those obligations, the rationale offers no apparent reason to grant him freedom. How then to reconcile these two contradictory observations—the fact that Madison and Jefferson would have extended protection to Calvinists, and the fact that their defense of religious liberty offers no reason to do so?

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374 *See* I. BRANT, *supra* note 305, at 127-30; R. KETCHAM, *supra* note 305, at 57-58; WILLIAM LEE MILLER, THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC 95 (1986); James Madison, *Letter to William Bradford (Jan. 24, 1774)*, in RELIGIOUS LIBERTY, *supra* note 312, at 47-48.

375 *See* T. JEFFERSON, *Notes on Religion*, *supra* note 307, at 93 ("Arminians. They think with the Romish church (agt the Calvinists) that there is an universal grace given to all men, & that man is always *free* & at liberty to receive or reject grace.") (emphasis in original). Madison, too, noted this distinction while preparing notes for the debate on religious liberty in the Virginia assembly. Madison drafted a question to those who would establish Christianity, apparently as a way of showing the difficulties in defining Christianity: "Is it Trinitarianism, arianism, Socinianism? Is it salvation by faith or works also—by free grace, or free will—&c &c &c—." James Madison, *Notes on Debate*, in RELIGIOUS LIBERTY, *supra* note 312, at 54.

376 Madison, *supra* note 375, at 99. The question is drawn virtually verbatim from Locke's *Letter Concerning Toleration*. *See* J. LOCKE, *supra* note 316, at 25.

377 The anti-Calvinist roots of Jefferson's defense of religious liberty are especially clear in his writings. Jefferson regularly and heatedly denounced the doctrine of predestination as cruel, barbarous, and contrary to enlightened religion, and he exhibited great hostility to Calvin and Calvinist ministers. He could not believe that a just, benign God of reason wonld ignore the efforts of individuals to achieve salvation. *See, e.g.*, T. JEFFERSON, *Letter to Benjamin Waterhouse*, *supra* note 307, at 219; T. JEFFERSON, *Letter to Charles Thomson*, *supra* note 308, at 5-6; THOMAS JEFFERSON, *Letter to John Adams (Apr. 11, 1823)*, *in* WRITINGS II, *supra* note 307, at 1466-69; Alan V. Briceland, *Thomas Jefferson's Epitaph: Symbol of a Lifelong Crusade Against Those Who Would "Usurp the Throne of God"*, 29 J. CHURCH & ST. 285, 288 (1987). As we have seen, Jefferson's defenses of religious liberty are based on this view of religion. Jefferson makes this origin very clear when he explains that the law reaches injuries to others, but if a man neglects the care of his soul he injures only himself. Indeed, "God himself will not save men against their wills."—T. JEFFERSON, *Notes on Religion*, *supra* note 307, at 100—a direct contradiction of strict predestinarianism, which held that God always saves men against their depraved wills.

One plausible answer may be that Jefferson and Madison sacrificed theoretical consistency to their political pragmatism. Without help from the Calvinists, they had no chance of winning the struggle for religious liberty and so had to extend protection to them. This answer is certainly consistent with the political pragmatism that Jefferson and Madison exhibited during their campaign for religious liberty,[378] and it may as a matter of historical fact be the most likely. But, for purposes of constitutional analysis, there is a more satisfying answer.

D. The Contribution of Isaac Backus

Another possible explanation may reconcile the framers' volitionalist defense of religious liberty with their extension of it to nonvolitionalist groups. From the first, no supporter of religious liberty seriously believed that the other supporters would agree on one definitive metaphysical rationale. Instead, the exponents agreed on a single practical result—religious liberty for all—but for widely differing reasons, each with the understanding that the others would adopt different internal rationales. Thus, Jefferson's rationale would explain to Deists why religious liberty is important for Deists, and Calvinist defenses would do the same for Calvinists.[379] Under this view, no one metaphysical defense should enjoy primacy in the exposition of the first amendment's meaning.

There are two primary reasons for adopting this view of the religion clauses as an endpoint on which numerous, equally valid paths of reasoning converged. First, each metaphysical defense rests on a particular view of the nature of religion—a view with which some believers will disagree—and the defense will therefore advocate liberty for reasons which those believers will dispute. In effect, then, any metaphysical defense of religious liberty will endorse a particular view of religion as true.[380] If, for example, the metaphysical views of Madison and Jefferson are the definitive rationales for the religion clauses, the Constitution endorses Deism. This result is at least in tension with, if not contradictory to, the requirement of government neutrality created by the religion

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378 *See* R. KETCHAM, *supra* note 305, at 72; W. MILLER, *supra* note 374, at 33-34; Drakeman, *supra* note 314, at 435; Marvin K. Singleton, *Colonial Virginia as First Amendment Matrix: Henry, Madison, and Assessment Establishment*, 8 J. CHURCH & ST. 344, 356 (1966).

379 *Cf.* John H. Garvey, *Free Exercise and the Values of Religious Liberty*, 18 CONN. L. REV. 779, 790 (1986) (rejecting the claim that the free exercise clause exclusively "rests on the value of individual autonomy" because many believers, including Calvinists, do not believe in personal autonomy).

380 For example, Jefferson and Madison wanted to protect the Calvinists' chances of winning salvation before a God who rewards the right choices, but the Calvinists themselves denied the existence of such a God.

clauses. If no single metaphysical view lies behind the first amendment, however, the amendment endorses no special religious perspective.[381] Thus, constitutional theory favors any account of the clauses' historical underpinnings that emphasizes multiple metaphysical roots.[382]

Second, as an historical matter, a multiplicity of metaphysical views did in fact contribute to the acceptance of religious liberty as a norm. It is a commonplace in scholarly commentary that the Supreme Court has overemphasized the historical importance of the views of Madison and Jefferson, who together were only one element in the complicated maneuvering of groups supporting the principle of religious freedom.[383] Perhaps more important, cer-

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381 Some range of views will still be effectively established—the range of metaphysical views that favor religious liberty—but that inevitably will be true if the first amendment has any metaphysical rationale. *Cf.* John H. Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CALIF. L. REV. 847, 856 (1984) ("The Constitution embodies a particular view of human nature, human destiny and the meaning of life. It is not neutral in this regard."). The amendment could possibly be held to have no metaphysical content—to be just a practical result without a metaphysical rationale. *See, e.g.*, RICHARD P. MCBRIEN, CAESAR'S COIN: RELIGION AND POLITICS IN AMERICA 99 (1987); JON COURTNEY MURRAY, WE HOLD THESE TRUTHS 56 (1960) (religion clauses are not "articles of faith but articles of peace," "not true dogma but only good law"). If this view is the correct one, the volitionalist views of Jefferson and Madison are completely irrelevant precisely because they are metaphysical.

The religion clauses are different from the rest of the Bill of Rights in this respect: the establishment clause in effect eschews all particular metaphysical defenses of religious liberty. No analogue to the establishment clause exists, for example, in the speech area, barring metaphysical defenses of expressive liberty; so the Constitution's protection of free speech migbt rest on a particular metaphysical explanation. *See infra* text accompanying notes 529-38.

382 Madison, if not Jefferson, would probably have sympathized with this description of the origin of the clauses. Madison was convinced that the only certain protection for religious liberty was the existence of a multiplicity of contending religious sects, none of which could achieve mastery over the state apparatus. *See* LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 70 (1986); THE FEDERALIST No. 10, at 55-56, 60-62 (J. Madison) (E. Earle ed. 1937). Madison was fond of quoting Voltaire: "[I]f one religion only were allowed in England, the government would possibly be arbitrary; if there were but two, the people would cut each other's throats; but as there are such a multitude, they all live happy and at peace." R. KETCHAM, *supra* note 305, at 166. Thus, it is quite consistent with Madison's thinking to conceptualize the religion clauses as a mutual peace pact between sharply disagreeing religious factions, each of which presumably had its own theological rationale for its support of the clauses.

383 *See, e.g.* MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS 9-12 (1965); Drakeman, *supra* note 314, at 427, 445; William G. McLoughlin, *Isaac Backus and the Separation of Church and State in America*, 73 AM. HIST. REV. 1392, 1392-93 (1968). Most of the skirmishing occurred over disestablishment, whether to allow for complete religious liberty under a neutral state, rather than the more limited toleration possible under a state establishment. Historians have identified at least four sources of support for disestablishment: the Deists and the evangelicals; the conservative denominations, each of which agreed to disestablishment so that no other denomination could seize control of the federal government; and those individuals, perhaps more numerous in the 1780s than at any later time until very recently, who were hostile to institutional religion and

tainly louder, and in any event indispensable was the support of the Calvinist denominations, the Presbyterians and the Baptists.[384] The Baptists in particular were the most consistent, organized supporters of religious liberty in the years before the Constitutional Convention, and the definitive statement of the Baptist view is Isaac Backus's *An Appeal to the Public for Religious Liberty*.[385]

Drawing heavily on the work of Roger Williams,[386] Backus began his pamphlet with an assertion of the Calvinist doctrine of utter depravity, which throughout his life he fervently defended against Arminianism. Based on this view of man, Backus repudiated the social contractarian view that the individual surrenders some natural liberties by submitting to government. Backus maintained that fallen man in a "state of nature" is a slave and attains freedom only by entering into government.[387] Backus divided this freedom-through-government into two types: Christian and civil. As to Christian freedom, unregenerate "natural" men are not free but slaves to Satan, ruled by sin. They will attain Christian freedom only by conversion, when they are brought under direct rule by God to obey the rule of love written in their hearts by the divine finger. True liberty is doing not as one chooses but as God chooses one to do. Divine government of the unruly heart is thus necessary for Christian freedom.[388]

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the clergy in general. *See* S. MEAD, *supra* note 305, at 35-37, 43; Gaustad, *supra* note 306, at 409-25.

384 *See* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 257 (1967); T. BUCKLEY, *supra* note 366, at 143, 164, 175-76; S. MEAD, *supra* note 305, at 43; McLoughlin, *supra* note 383, at 1392-93; Rutland, *supra* note 316, at 203-04. Even late in life, Madison remembered the importance of the support of Calvinist sects in the Virginia struggle. *See* James Madison, *Detached Memoranda*, in RELIGIOUS LIBERTY, *supra* note 312, at 90.

385 ISAAC BACKUS, *An Appeal to the Public for Religious Liberity*, in ISAAC BACKUS ON CHURCH, STATE, AND CALVINISM 303-43 (1968); *see* B. BAILYN, *supra* note 384, at 261-67 (1967); McLoughlin, *supra* note 383, at 1405-06. Backus was an official representative of the New England Baptists, but bis work accurately represents the views of the Virginia Baptists as well. *See* T. BUCKLEY, *supra* note 366, at 38-39, 176.

386 Backus and Williams agreed on a number of ideas: direct rule by God over believers, the origin of the state by agreement of unregenerate souls, and the state's consequent lack of authority over religion. Backus differed from Williams primarily in his ecclesiological beliefs. Williams believed, or came close to believing, that the true church had vanished from the earth and could not be found again. God ruled directly over individuals and not over ecclesiastic institutions. *See* E. MORGAN, *supra* note 337, at 45-51. As a result, no human effort—by the state or by private individuals—to form a church would prove availing. The state must leave religion free to allow the individual his lonely relationship with God. *See id.* at 115-20. Backus, on the other hand, had considerable confidence in the work of the churches, but believed that the state could only detract from that work. The state must therefore leave religion free to allow individuals their relationship to both God and the church. *See* McLouglin, *supra* note 383, at 1402-03.

387 I. BACKUS, *supra* note 385, at 309.

388 *Id.* at 309-11.

Civil freedom, on the other hand, is possible only under a civil government, because without order sinners will naturally prey upon one another and upon those who have received grace. God therefore allows men to form governments so as to restrain the sinners and preserve civil peace.[389] Human governments are formed primarily by unregenerate men for necessarily limited purposes. The unconverted can have no authority over true religion, and so they cannot transfer any such authority to merely civil governments.[390] They exist only to keep the peace, not to promote salvation. God Himself has assumed complete rule over His own church, leaving no room for human ordinances:[391] "['T]is only the power of the Gospel that can set [men] *free from sin.*"[392] Mortals who set up "a test of orthodoxy . . . usurp God's judgment seat" by pretending to sort men and doctrines.[393]

Thus, in diametric opposition to the argument of Jefferson and Madison, Backus's rationale for religious freedom rests on the utter inefficacy of human choice. Backus believed that civil governments have no power over religion precisely because human governments are the products of human choice, from which no good can come. Only God can save man, and so man must be subject only to divine government in religion. The goal of religious liberty is thus not to leave man free to seek his salvation, but to leave the Spirit free to act within man without external constraint. The prerogative protected by the principle of religious freedom is not man's but God's.

Unlike Madison, Backus had no direct hand in the drafting of the Bill of Rights, but his view was typical of the first amendment's supporters. More supporters shared this Calvinist view than any other, and their organized activism was indispensable to the ultimate success of the amendment.[394] Thus, the religion clauses became possible because volitionalist and nonvolitionalist groups agreed on the goal of religious freedom, not on its rationale. Jefferson might have expounded a Deist argument to explain to like-

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389 *Id.* at 312.

390 *Id.* at 313-14.

391 *Id.* at 313-16.

392 *Id.* at 311 (emphasis in original).

393 *Id.* at 320-21. Backus, like some other Calvinists, sometimes used language that to modern ears suggests a volitionalist view of religion. This impression is attributable to the modern volitionalist gloss on the meaning of certain words. For instance, Calvinists often assert that religion should be "voluntary," but by this they mean only that religion should be a private matter uncoerced by the state; not that human choice has any salvific significance. Similarly, they assert that religious observance is a "duty to God" and a "matter of conscience"; but these phrases mean that all sinning humans owe God such a duty, not that their own choices can in any way contribute to the fulfillment of that duty.

394 *See supra* text accompanying notes 383-85.

minded believers why liberty should prevail; but at the same time he recognized that Calvinists like Backus would adopt a predestinarian theory to reach the same conclusion. At their inception, the religion clauses impartially sheltered both views of religion.

E. Objections to the Relevance of Colonial Calvinism to Sacred Land Claims

In response to our analogy between Calvinism and American Indian religions, a legislature or court might assay a number of distinctions. One would emphasize the fact that in the Calvinist cosmos, government cannot affect the salvific process. Unlike the Indian place-spirits, the Calvinist God is transcendent and omnipotent. As a result, Calvinists would not need legal protection for the process of conversion. Thus, Jefferson, Madison, and Backus might have admitted that nonvolitionalism is a perfectly legitimate belief, while never imagining that nonvolitionalist religions could benefit from legal protection against discrimination.

There are two primary flaws in this argument. First, the government could and did create a variety of nonvolitionalist harms for Calvinists, although it could not force the Almighty to grant or withhold grace. For most predestinarians, God works through human beings. For example, God might choose the most unlikely individuals to preach this Word, as an occasion to call others to grace. Early revivalist demands for religious liberty often challenged state laws requiring licenses for preaching. These laws typically granted licenses only to members of the established church or to educated ministers. Calvinists believed that the voice of God could speak through any person at any time, and so the government should not limit the number of potential mouthpieces for the Almighty. This licensing controversy convulsed the colonies in the middle and late seventeenth century.[395]

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395 *See* THOMAS J. CURRY, THE FIRST FREEDOMS 95-97 (1986); E. GAUSTAD, *supra* note 356 at 70-72; R. ISAAC, *supra* note 357, at 151-54; WILLIAM G. MCLOUGHLIN, ISAAC BACKUS ON CHURCH, STATE, AND RELIGOUS LIBERTY 5 (1968) (Introduction); Robert S. Alley, *The Despotism of Toleration*, in RELIGIOUS LIBERTY, *supra* note 312, at 142, 143-44. Another example of God's intervention in the affairs of bumankind is His decision to gather His saints in a Godly Commonwealth in New England. Government action that sought to thwart this Divine Will would directly cause negative religious effects. Thus, throughout the colonial period, many libertarians across the colonies criticized the Congregational Standing Order in New England for too closely entwining church and state. The Congregationalists regularly responded that dismantling the Standing Order would infringe their religious liberty by denying them the religious experience of living in a godly commonwealth. *See* T. CURRY, *supra*, at 23-24, 82-83, 88. Allowing such extreme special treatment today would surely create establishment clause problems, but this should not detract from the point that the framing generation would have recognized government-induced nonvolitionalist harms.

Since such harms did occur, it seems surprising that the first nonvolitionalist claims

Calvinist preachers used their argument in this controversy as a call for liberty from the oppressive laws of Great Britain and of the emergent states. Drawing on Edwardsian theology,[396] these preachers conceded that moral liberty consists only in willing as we in fact will. Since without God's grace we all in fact choose to sin, moral liberty cannot rest on a self-determining will. Further, government cannot guarantee or restrict moral liberty. But government can disrupt natural liberty—the physical ability to act upon the promptings of God. And "[i]f men were to be wholly free to do the will of God—to do that which was good, just, and honest—'natural liberty' was an absolute necessity."[397] Revolutionary Calvinists, in fact, had to fight an anarchistic tendency that would deny governments the right to restrict liberty in any way.[398] In this sense, any government action could create nonvolitionalist Calvinist harms.[399]

Even if no such harms had existed, moreover, the proffered distinction proves only that the framers had no specific intent about whether the free exercise clause extends to nonvolitionalist religions, because they never anticipated that the government could affect such religions. As a result, we must resort to inferential evidence to determine the framers' likely intent. That evidence strongly suggests that the framers would not have allowed the government to discriminate against nonvolitionalist religions. They purported to adopt a principle of equal religious liberty and govern-

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to come before the Court were Indian, rather than Calvinist. The reason may be that after the adoption of the first amendment and analogous state provisions, Calvinists simply faced no persecution. They initially constituted the majority, and therefore remained highly respectable. In addition, governments in the early period were relatively inactive and so did not generate many claims. When claims did arise, the Court did not vigorously enforce the free exercise clause. The only significant nineteenth century cases are notable primarily for their restrictive interpretation of the clause. *See* Davis v. Beason, 133 U.S. 333 (1890); Reynolds v. United States, 98 U.S. 145 (1878), *overruled on other grounds*, Thomas v. Review Bd., 450 U.S. 707 (1981). By the twentieth century, strict Calvinism had all but died out. *See infra* text accompanying notes 422-25.

396 *See supra* note 361.

397 A. HEIMERT, *supra* note 359, at 458.

398 *See id.* at 458-60.

399 The Calvinists faced one remaining difficulty, little noted by them, in making this argument: if God is truly omnipotent, logically does be not also control the government's actions, so that even laws restricting religious liberty are God's own actions? The question, of course, suggests that there is no evil in the world, that all is for the best under the control of God's almighty hand. But strict Calvinists have always maintained that evil does exist, for reasons that might seem inconsistent with the existence of a truly omnipotent God—because Satan controls humans (a dangerously dualist view, suggesting that God does not control Satan), or because humans were saved by God but sinned through their own fault (again a view suggesting that men are independent cosmic forces). *See* B. KUKLICK, *supra* note 360, at 6. Religions are not required to be logically consistent, and the important point for present purposes is that colonial Calvinists did in fact believe that liberty-restrictive laws were the product of evil men and not of God.

ment neutrality; and they could not have meant that principle to exclude the nonvolitionalism that was so much a part of their religious landscape. Suppose, for example, that the new republic did develop the power to issue cosmic bills of attainder to God, directing him to give or deny grace to named individuals. The Calvinists who formed the majority support for the principle of religious liberty and the Deists who benefitted from that support would have been stunned if the legislatures or courts refused to recognize such a harm on the grounds that it was nonvolitionalist.

Courts or legislatures might offer one other distinction between Native American religions and colonial Calvinism: predestinarian Calvinism may not be volitionalist, but it is fundamentally individualist because all significant events for an individual happen within that individual. God may save an individual without regard to that individual's will, but he does so by acting through the individual's thoughts, feelings, and actions. According to this view, the framers meant the free exercise clause to address the tendency of governments, not to alter the environment, but directly to affect the behavior of individuals. As a result, a volitionalist bias may be inappropriate, but an individualist bias has the support of history.

This view of the free exercise clause suggests its own orthodoxy: some gods might act through and in the environment, but the God of the Constitution has chosen to withdraw to the human breast, leaving the natural world desacralized and sterile. Concomitantly, this orthodoxy implicitly posits a gulf between man and nature: the natural world is a religiously lifeless object which humans exploit to serve their needs. The Native Americans, by contrast, believe that man is deeply and inextricably enmeshed in and defined by the natural world, parts of which retain a sacral quality.[400] While the natural and the supernatural are not identical, the supernatural regularly erupts into the natural world, especially at sacred sites, and not just into human beings.[401] But, according to this argument, even if individualism is an orthodoxy, it is an orthodoxy that the framers intended.

This argument fails because it rests on a distorted understanding of colonial Calvinism, which even in the 1780s retained a sense of the sacredness of the land. It is true that New England Calvinism always contained an introspective element, the obsessive concern of

400 *See, e.g.*, FREDERICK TURNER, BEYOND GEOGRAPHY (1980); Calvin Martin, *The Metaphysics of Rewriting Indian-White History*, in THE AMERICAN INDIAN AND THE PROBLEM OF HISTORY 27-30 (Calvin Martin ed. 1987).

401 *See supra* text accompanying notes 199-202.

each individual to locate signs of salvation in himself.[402] It is also true that at the turn of the nineteenth century, Calvinism was undergoing an evolutionary change that would ultimately, for many, confine the voice of God to the promptings of the human breast by identifying the will of God with the happiness of individuals.[403] But in 1787, that point was still very much in dispute, and many Calvinists still maintained that God infused the natural as well as the human world with meaning.

The earliest manifestation of this reverence for the land was the virtually universal belief among early Puritans that God had imbued New England with special significance. It was a home chosen by the Almighty for his remnant, a New World kept hidden until the Puritans were ready to complete the Reformation by fleeing the corruption of the Old. The Puritan encomia to the land of New England never specify what the Puritans could achieve only in New England, but it is clear that New England was more than just an expedient location for them to create their godly commonwealth, because God Himself chose this spot for them.[404] If, implausibly, the English government had tried systematically to make New England unlivable, the Puritans would surely have objected to the desecration of their sacred home.

During the Great Awakening, the evangelical heirs of Cotton and Norton deemphasized the exceptionality of New England while increasing the emphasis on the communion of all the regenerate throughout the colonies.[405] Indeed, many historians maintain that the Awakening was an important antecedent to the Revolution in creating some self-conscious unity among like-minded believers across colonial boundaries.[406] But while the sense of New England as sacred was less acute by 1787, citizens of that region still retained cultural memories of that sacredness (indeed, some still do so today). More importantly, the faith of the Fathers still commanded tremendous respect[407] and Revolutionary Calvinists could not have dismissed a central tenet of that faith as unworthy of constitutional protection.

After the Awakening, moreover, New England may have lost some of its special significance, but Nature as a whole gained greater significance, at least among evangelicals. Calvinists always sought

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402 *See* SACVAN BERCOVITCH, THE PURITAN ORIGINS OF THE AMERICAN SELF 20 (1975); CHARLES LLOYD COHEN, GOD'S CARESS 4-5, 14 (1986).

403 *See* J. JONES, *supra* note 333, at 149.

404 *See* S. BERCOVITCH, *supra* note 402, at 98-108.

405 *See id.* at 99-106.

406 *See, e.g.*, JOHN F. BERENS, PROVIDENCE AND PATRIOTISM IN EARLY AMERICA 1640-1815, at 29-31 (1978); B. KUKLICK, *supra* note 360, at 59-60.

407 *See* S. BERCOVITCH, *supra* note 402, at 123-28.

to separate God and nature in order to preserve God's transcendence and omnipotence, and steadfastly maintained that they were not pantheists. But Calvinists also believed that the universe was the handiwork of God, that God was present in every molecule, and that its continuance was due only to His ongoing superintendence. Perry Miller linked these two strains with the volitionalist and nonvolitionalist tendencies in colonial Calvinism. On the one hand, Puritans hungered for the direct experience of nonvolitionalist regeneration, of seizure by God, and were as quick to perceive divine emanations in the landscape—in "the divine symbolism of nature"—as in themselves. On the other hand, Puritans desired a social ethic of law, order, and institutional control. With this ethic went an emphasis on the doctrine of preparation and a denial of the Antinomian notion that God spoke directly to each individual, and the pantheistic notion that He spoke to the believer through His immanence in nature.[408]

After the Great Awakening and the widespread adoption of Newtonian physics, these two strains—essentially the New Calvinist and Unitarian strains already described—would diverge further. On the one hand, Chauncy and his Unitarian followers would describe the universe as a great Newtonian mechanism, created and ruled by God according to discernable rules—but very much an object upon which God works, not God Himself.[409] On the other hand, Edwards and his followers would come not so much to identify God with nature as to identify nature with God. To Edwards, all matter is part of the substance of God Himself, an extension of the Divine Being. God acts not on but within matter, and matter is nothing but God's acting.[410]

This split should not, however, obscure a deeper unity: both groups believed that God made Himself manifest through nature. The Unitarian Newtonians held that the believer could discern the nature of God in the clockwork quality of the rule-governed universe; one could understand the Designer through the design.[411] The Edwardsians, verging on pantheism and mysticism, claimed that a believer could, however dimly, glimpse God directly in nature.[412] For both of these groups, God had not yet withdrawn him-

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408 PERRY MILLER, *From Edwards to Emerson*, in ERRAND, *supra* note 336, at 189-93.

409 *See* C. LIPPY, *supra* note 358, at 114; J. TURNER, *supra* note 310, at 45-47, 96-97.

410 *See* PERRY MILLER, JONATHAN EDWARDS 91-94 (1949).

411 A mechanistic universe does not logically require the existence of God at all, as the intellectual descendants of the Newtonians would ultimately realize. In the eighteenth century, however, He still governed every molecule. *See* J. TURNER, *supra* note 310, at 179-87.

412 For Edwards, the glory of God in the world was like the light from the sun:

> It is by this that the sun itself is seen, and his glory beheld, and all other

self to the interiors of individual souls, had not yet evaporated out of nature under the heat of a scientific view that no longer needs Him to explain the physical world. And if, however implausibly, the federal government found a way to disrupt the laws of gravity or matter, Edwards and Chauncy would both have lost the ability to glimpse God in the natural world.

Finally, for the Calvinists God not only manifested Himself generally in the laws of nature or in matter; He sometimes directly intervened in the affairs of men, in "special providences."[413] He sent disease to kill off the New England Indians, to make room on the new continent for Puritan settlement.[414] He kept the New World hidden from mariners until the time was right for His chosen remnant to emigrate to it.[415] He calmed the waters of the North Atlantic to allow for easy passage of the early Puritans in the Great Migration.[416] He sent intermittent earthquakes to remind His chosen of His wrath, so that they would fearfully flock to church, where God would act upon their souls.[417] Even as late as the Revolutionary War, God sent disease to the Continental Army to remind them to rely on Him rather than on their own efforts to win the war.[418] If the federal government had found a way to quell earthquakes, it would have silenced God's voice and thereby prevented a renewal of faith.

In the overall course of history individualism, like volitionalism, is a very recent development. Certainly by 1787 believers had not yet become so self-focused that they had difficulty imagining that anything other than their own thoughts, feelings, and actions could have sacred potential. The early Puritans by and large hated the beliefs of their aboriginal neighbors not because the Indians glimpsed the divine in the natural, but because they worshipped the wrong divinity: Manitou, Hobbamock, or others, whom the Puritans identified with Satan, rather than Providence.[419] For the Puritans the natural world was still mysterious and religiously charged, full of

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> things are discovered; it is by a participation of this communication from the sun, that surrounding objects receive all their lustre, beauty and brightness. It is by this that all nature is quickened and receives life, comfort, and joy.

Jonathan Edwards, Dissertation Concerning the End for which God Created the World, *quoted in* P. MILLER, *supra* note 408, at 195.

413 DAVID HALL, WORLDS OF WONDER, DAYS OF JUDGMENT 71 (1989).

414 *See id.* at 92; NEAL SALISBURY, MANITOU AND PROVIDENCE 3 (1982).

415 *See* S. BERCOVITCH, *supra* note 42, at 69.

416 *See* D. HALL, *supra* note 413, at 91-92. Well after the Great Migration, tales of providential sea-deliverance occupied the minds of even the most intellectual Puritans. *See id.* at 88.

417 *See* HARRY S. STOUT, THE NEW ENGLAND SOUL 178-79 (1986).

418 *See* J. BERENS, *supra* note 406, at 66.

419 *See* N. SALISBURY, *supra* note 414, at 3-4, 137-38.

portents, folk magic, spirits, and the distant sound of divine trumpets on the wind.[420] Compared to the *Lyng* Court's placid condescension toward Indian religions, their hatred was a mark of respect. The Puritans experienced Indian belief as a meaningful threat, because the Indians worshipped the real presence of Satan in nature. The *Lyng* Court rather plainly believed that the Indians worship lifeless landscape, which could better be used by logging trucks.

F. Conclusion: The General Significance of the History of Colonial Religion to the Religion Clauses

We do not suggest what, if any, relationship the history of the first amendment should bear to its interpretation. To whatever extent that history is relevant, it will not support the idea that a volitionalist bias is compatible with religious liberty. Jefferson and Madison may personally have held volitionalist beliefs, and they may have embedded this view in the political provisions of the Constitution. In this sense, the Constitution as a whole may well be the product of an "Arminian" model of man. The free exercise clause, however, is unusual. In guaranteeing religious liberty, it necessarily protects varying beliefs about the nature of human beings and lends its imprimatur to none. As perplexing as Calvinism may seem today, the clause was written as much for predestinarians as for Arminians. For these predestinarians, the central religious event was something to which individual activity had no relevance: the awful and imponderable decision of God to impart grace to some and not to others for His own reasons and in His own time. Like the nonvolitionalist claims of the American Indians, the essential Calvinist experience was that of a mortal subject to changes in the universe beyond his control.

In the free exercise clause, the Calvinists found protection from the free-will metaphysic of the Constitution's political scheme and the ideological movements loosely associated with that metaphysic. In politics, religion, philosophy, and law, the national culture developed around the central assumption that the only justifiable basis for advantages or disadvantages, good or ill treatment, is free choice—in the form of a vote, a market decision, or the resolution to receive Jesus into one's life.[421] The Calvinists, for a time, opted out

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420 *See generally* D. HALL, *supra* note 413, at 71-116.

421 After the turn of the nineteenth century, revivalism became the dominant form of American religiosity. Revivalism was aggressively Arminian: it called upon the sinner to exercise his free will to allow Jesus to take possession of his soul. *See* S. MEADE, *supra* note 305, at 123-24. The rise of Methodism, the largest American denomination in the mid-nineteenth century, also heavily contributed to the Arminian mood of the country as a whole, both because Methodism itself was openly Arminian and because it prompted other denominations to revise their beliefs. *See* S. AHLSTROM, *supra* note 358,

of this sunny, aggressive, and active attitude that ascribed so much significance to human endeavor, choice, grit, and gnmption. Eventually, even the Calvinists surrendered to the rising tide: a substantial group of Northern Baptists—the Freewill Baptists—explicitly adopted an Arminian stance in the Great Revivals;[422] the main branch of Congregationalist theology, the New Haven theology, adopted a more careful and analytical version of Arminianism;[423] and even the Presbyterian Church (North) gave the Westminster Confession an Arminian interpretation.[424] As Sydney Ahlstrom has eloquently put it, the question "Are you saved?" has come to mean "Have you decided to be saved?"[425] Today, it is likely that few Protestants of a Reformed tradition could explain the concept of predestination.

In other words, like the de facto Protestant Establishment of the nineteenth century, the twentieth century has witnessed a de facto establishment of volitionalist religion. Furthermore, the Supreme Court's cavalier rejection of nonvolitionalist claims is a de jure recognition of this de facto establishment. The Court may have assumed that religion has always been volitionalist within the historical "frame of reference" held by the framers. As a result, the Court may have regarded the Indians' nonvolitionalist frame of reference as a modern or countercultural notion lying beyond the pale of constitutional orthodoxy. But in fact it is the Court's blithe volitionalist assumption that is the modern development. The framers knew that there were more things in Heaven and earth than could be dreamt of in any one theological system, no matter how widely shared.

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at 438-39; WINTHROP S. HUDSON, RELIGION IN AMERICA 180-81 (1981). Evangelical reformers, too, were generally Arminian, espousing man's capacity to bring about the millennium on Earth through unflagging toil. *See* RONALD G. WALTERS, AMERICAN REFORMERS 1815-1860, at 26-29, 82, 120, 170-71 (1978).

A number of historians have noted the linkage between Arminian theology and free market ideology in that both rest on the significance of individual choices as the causes of legitimate effects, whether in the market or in the afterlife. *See* A. HEIMERT, *supra* note 359, at 55; J. JONES, *supra* note 333, at 162-63. Arminianism also harmonizes with belief in representative democracy: just as individuals can choose to be saved in Heaven, they can choose to be "saved" on Earth. S. MEAD, *supra* note 305, at 123-24. The archrevivalist Charles G. Finney made this connection explicit when he urged his audience to "vote in the Lord Jesus Christ, as governor of the universe." *Id.* at 124.

422 *See* S. AHLSTROM, *supra* note 358, at 321-22; WILLIAM WARREN SWEET, RELIGION ON THE AMERICAN FRONTIER: THE BAPTISTS, 1783-1830, at 66 (1964).

423 *See* B. KUKLICK, *supra* note 360, at 99-105.

424 *See* S. AHLSTROM, *supra* note 358, at 444-45, 844; W. HUDSON, *supra* note 421, at 180-81. For an analysis of the general collapse of Calvinism in the nineteenth century, see J. TURNER, *supra* note 310, at 89-95. For a poetic, sardonic comment on the collapse of predestinarian Calvinism during the same period, see OLIVER WENDELL HOLMES, THE ONE-HOSS SHAY (1891).

425 S. AHLSTROM, *supra* note 358, at 845.

SECTION SIX.
THE ARGUMENT FROM POLICY AND PRECEDENT

As the previous section has demonstrated, neither the language nor the history of the free exercise clause justifies the differential treatment of nonvolitionalist claims. The third source of guidance to which the Court regularly turns in its efforts to interpret the Constitution is its own precedent. The constitutional "frame of reference"[426] that underlies the Court's volitionalist bias might, then, have its foundation in the doctrines and policies that have emerged from the Court's earlier attempts to interpret the free exercise clause. There is, however, little in the case law to justify this position. In fact, the Court's discriminatory stance conflicts with the policies and doctrines developed in previous cases.

Until *Bowen*, the Supreme Court had never directly confronted a clear nonvolitionalist claim. The case law, therefore, does not include any precedent directly addressing the constitutional status of nonvolitionalist religions. As a result, all of the evidence is indirect and inferential. Nonetheless, some strong precedential arguments favor the equal status of nonvolitionalist religions. First, in *Wisconsin v. Yoder*,[427] the Court came very close to recognizing and approving a nonvolitionalist free exercise claim. Second, two of the major principles or policies in free exercise clause jurisprndence—neutrality between religions and voluntarism—provide persuasive arguments for the acceptance of nonvolitionalist practices on an equal footing with volitionalist ones.

Ranged against this evidence are dicta in several cases expressing the Court's apparent assumption that all religion is volitional.[428] The dicta do not, however, either expressly or implicitly maintain that religious practices based on a contrary view of religion fall outside the scope of constitutional protection. Indeed, on those few occasions in which the Court directly addressed the definition of religion, it refrained from imposing or privileging a volitionalist view of religion.[429] Thus, the fact that the Court may have, in its less self-conscious moments, given voice to a particular view of reli-

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426 Bowen v. Roy, 476 U.S. 693, 701 n.6 (1986).

427 406 U.S. 205 (1972). In both *Smith* and *Lyng*, the Court offered reinterpretations of *Yoder*, but, as we argue at *infra* text accompanying notes 432-43, 457-62, these new interpretations are erroneous.

428 *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 53 (1985) ("religious beliefs worthy of respect are the product of free and voluntary choice by the faithful"); McDaniel v. Paty, 435 U.S. 618, 640 (1978) (Brennan, J., concurring) ("Fundamental to the conception of religious liberty protected by the Religion Clauses is the idea that religious beliefs are a matter of voluntary choice by individuals and their associations . . . .").

429 *See infra* text accompanying notes 498-528.

gion does not provide precedential support for the denial of free exercise protection to other views.

A. *Wisconsin v. Yoder*

Prior to *Bowen* and *Lyng*, the closest the Court had ever come to addressing a nonvolitionalist claim was in *Wisconsin v. Yoder*.[430] The case concerned a state compulsory education law which required parents to send their children to school until the age of sixteen. The claimants were Old Order Amish parents who had been convicted for refusing to send their fourteen- and fifteen-year-old children to high school.[431] The Supreme Court reversed their convictions, holding that the state was required to exempt them from the compulsory education law.

Almost twenty years later, in *Smith*, the Court attempted to reclassify *Yoder* as a "hybrid" case involving both religious rights and parental rights.[432] This reclassification was intended to explain why the exemption from a facially neutral law allowed in *Yoder* did not provide a precedent for religious exemptions generally. There are, however, two difficulties with this explanation: First, the *Yoder* opinion rests squarely on the free exercise clause, rather than on some combination of rights; and second, even if the judgment had rested on a combination of constitutional rights, that fact would not explain why exemptions are available for a hybrid case but unavailable when only religious rights are at stake.

The *Yoder* Court explicitly based its decision on religious rights rather than parental rights. The Court described the claims as "concerning the alleged encroachment of Wisconsin's compulsory school-attendance statute on [the parents'] rights and the rights of their children to the free exercise of [their] religious beliefs."[433] It defined its holding as being the same as that of the Wisconsin Supreme Court,[434] which it described, in turn, as "holding that respondents' convictions for violating the State's compulsory school-attendance law were invalid under the Free Exercise Clause of the First Amendment to the United States Constitution made applicable to the States by the Fourteenth Amendment."[435]

The Court did discuss the parental rights of the Amish parents, but that discussion did not represent a separate basis for the opin-

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430 406 U.S. 205 (1972).

431 *See id.* at 208.

432 *See* Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595, 1601, *reh'g denied*, 110 S. Ct. 2605 (1990).

433 *Yoder*, 406 U.S. at 215.

434 *See id.* at 234.

435 *Id.* at 207.

ion. Rather, the Court discussed the parental rights in response to the State's argument that the attendance law was justified by the compelling interest in the State's role as *parens patriae*. The existence of a primary parental right to control the upbringing of the child indicated to the Court that the government does not have such a broad *parens patriae* role and, therefore, cannot offer it as a compelling state interest.[436]

Indeed, it would make little sense for the Court to place much reliance on the parental right because it is generally much weaker than the religious right. The Court explicitly stated, that "where nothing more than the general interest of the parent in the nurture and education of his children is involved, it is beyond dispute that the State acts 'reasonably' and constitutionally in requiring education to age 16."[437] The relevance of the fact that "interests of parenthood are combined with a free exercise claim"[438] is that the religious rights add strength to the parental claim,[439] not vice versa, as the *Smith* Court implied.[440]

Even if we were to assume, however, that the parental right is of the same stature as the religious right, and that *Yoder* involved a combination of the two, that would not explain why an exemption was appropriate in a hybrid case and not in a case where only religious rights are at stake. The reasons that the Court gave in *Smith* for rejecting the possibility of an exemption apply with as much force to a parental right as to a religious right. The Court was concerned that such exemptions would make "each conscience . . . a law unto itself"[441] and would lead to an anarchical "private right to ignore generally applicable laws."[442] But allowing exemptions whenever parental rights (or parental rights combined with religious rights) conflict with social policy would lead to precisely the same kind of anarchical private right. Furthermore, there is no prima facie reason to suppose that parents would assert this right less often or with less disruptive consequences.[443]

Putting aside the *Smith* Court's reading, then, *Yoder* does involve a religious exemption to a facially neutral, generally applicable law. More importantly for our purposes, it involves an exemption for a

436 *See id.* at 232-34.
437 *Id.* at 233.
438 *Id.*
439 *See id.*
440 *See Smith*, 110 S. Ct. at 1601 n.1.
441 *Id.* at 1606.
442 *Id.* at 1604.
443 If the Court is suggesting that the sheer number of rights at stake would change the constitutional analysis so dramatically, the simple response is that such a suggestion is completely without basis in precedent. On the subject of hybrid rights cases, see McConnell, *supra* note 272, at 1121.

partially nonvolitionalist claim. The Yoders' claim contained both volitionalist and nonvolitionalist elements. First, the parents asserted that they (and their children) would be directly violating a tenet of their religion—and risking their salvation—if they allowed the children to attend high school after the age of fourteen.[444] This is a clear volitionalist claim: the state facially forbade the parents from choosing to follow the dictates of their religion.

The parents also asserted, however, that mandatory high school education would threaten the continued existence of the Old Order Amish community.[445] The parents presented expert testimony, which the Court described in its opinion,[446] to show that high school education could "ultimately result in the destruction of the Old Order Amish church community" and the Amish way of life.[447] There are two possible interpretations of the relevance of this testimony.

First, one may understand this evidence simply as a measure of the degree of volitionalist harm the members of the religion would suffer as a result of the challenged government action. The threat to the continued existence of the community would provide some indication of the importance of the particular religious rule the Amish parents were being forced to violate. Some lower courts seem to have adopted this interpretation and have taken it a step further by holding that *Yoder* mandated a "centrality" test. This new standard requires free exercise claimants to demonstrate that the practice burdened by the government is of central importance to their religion[448] or that the challenged government action interferes with an "indispensable" aspect of that practice.[449]

The Supreme Court has, however, rejected this interpretation of *Yoder*. Subsequent Supreme Court cases have not considered the centrality or importance of the particular practice to the individual or group claiming the religious exemption.[450] Indeed, in *Lyng*, the Court explicitly rejected a centrality requirement, arguing that it would place courts in the untenable position of having "to weigh the

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444 *See Yoder*, 406 U.S. at 209.

445 *See id.* at 209, 212.

446 *See id.* at 209-12.

447 *Id.* at 212.

448 *See, e.g.*, Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159, 1164 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980).

449 *See* Wilson v. Block, 708 F.2d 735, 743-44 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983).

450 *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 142-43 (1987) (rejecting argument that loss smaller than that imposed in *Sherbert* should lead to reduced scrutiny); Pepper, *supra* note 109, at 338 n.131 (arguing that the one "sliding scale" case—Johnson v. Robison, 415 U.S. 361 (1974)—is actually an instance of a de minimus burden).

value of every religious belief and practice that is said to be threatened by any government program."[451] In *Smith*, the Court reaffirmed its refusal to consider centrality.[452] It is therefore now plain that the discussion in *Yoder* concerning the harm to the religious community does not create a new doctrinal focus on the importance or centrality—in practical or religious terms—of the activity at issue.

The Court's discussion of the threat to the Amish community should, instead, be understood as the inchoate recognition of a nonvolitionalist claim. The Amish religion is communal: it depends, in part, upon the existence of an organized community to support its members—materially, emotionally, and spiritually—in the required way of life.[453] "There exists no Amish religion apart from the concept of the Amish community. A person cannot take up the Amish religion and practice it individually."[454] If the government undermines the continued existence of the community by forcing its children to attend high school, it may endanger the religious freedom of all who depend upon the community, not just the parents and children who are forced directly to violate their beliefs. A threat to the Amish community, therefore, jeopardizes the salvation of all community members, regardless of whether any member is personally responsible for the threat.

This latter harm is clearly nonvolitionalist. The religious effect that will follow upon the destruction of the community does not depend upon any choice by the members: all members will suffer harm regardless of whether they were individually forced to send their own children to high school or not. This claim is thus directly analogous to the claims made in the sacred land cases. The government's destruction of Native American sacred sites led to religious consequences for the Indians—such as the loss of spiritual powers—despite the fact that the Indians were not themselves responsible for the desecration in a volitionalist sense.[455] These nonvolitionalist claims arise because both religions posit that the spiritual success of each individual requires certain material conditions—the existence of particular geographical features or of a community of believers.[456] When the government destroys those conditions, it threatens individuals with religious harm whether or not the individuals

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451 Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 457 (1988).

452 *See Smith*, 110 S. Ct. at 1604-05.

453 *See Yoder*, 406 U.S. at 210 ("salvation requires life in a church community separate and apart from the world").

454 Brief for Respondents at 21, Wisconsin v. Yoder, 406 U.S. 205 (1972) (No. 70-110) (citing J. HOSTETLER, AMISH SOCIETY 131 (1968)).

455 *See supra* text accompanying notes 193-205.

456 *See Lyng*, 485 U.S. at 458 (Brennan, J., dissenting).

had any choice in the matter.[457]

The majority in *Lyng* explicitly rejected this nonvolitionalist interpretation of *Yoder* when Justice Brennan suggested it in dissent. Brennan argued that the Court allowed an exemption to the compulsory education law in *Yoder* "not so much because of the affirmative coercion the law exerted on individual religious practitioners, but because of 'the *impact* that compulsory high school attendance could have on the continued survival of Amish communities.' "[458] The majority responded by pointing out that the element of direct personal coercion was present in *Yoder* and by asserting that "there is nothing whatsoever in the *Yoder* opinion to support the proposition that the 'impact' on the Amish religion would have been constitutionally problematic if the statute at issue had not been coercive in nature."[459]

The *Lyng* Court's restrictive reading of *Yoder* presents two difficulties. First, it fails to provide any explanation for why the *Yoder* opinion found impact on the Amish community, as opposed to Amish individuals, to be relevant at all. If coercion of individual choice or conscience is the foundation of a free exercise claim, then the impact on the religion generally or on other uncoerced believers should be irrelevant. The lack of such a wide-ranging impact could not invalidate a claim if the necessary individual coercion were present. Moreover, the impact on the community could not have been relevant to indicate an especially great degree of harm. In the absence of something like the centrality requirement, exactly the same government interest—a compelling state end served by the least restrictive means—must justify any degree of intrusion on free exercise. Thus, under the *Lyng* majority's interpretation, the impact on the Amish community should be irrelevant to free exercise analysis; the *Yoder* Court's discussion of that impact could serve only as sympathetic posturing.

The *Lyng* Court's interpretation of *Yoder* presents another, more important difficulty in that the *Yoder* opinion itself suggests that the impact on the community can be a distinct and constitutionally sig-

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457 Indeed, even an individualist interpretation of the free exercise clause will not explain the relevance of the harm to the Amish community. An individualist would admit that actions other than free choice can give rise to religious consequences, but would insist that only an individual's own actions can cause moral consequences for him. *See supra* text accompanying notes 146-54. Destruction of the Old Order Amish community will, however, lead to religious consequences even for those members who did not contribute in any way to its collapse, because their own religious practice depends on the community's existence. Only a nonindividualist, nonvolitionalist view of moral consequences will explain the burden created by the threat to the Amish community as a whole.

458 *Lyng*, 485 U.S. at 466 (Brennan, J., dissenting) (quoting *Yoder*, 406 U.S. at 209).

459 *Id.* at 457 (majority opinion).

nificant interference with the free exercise of religion. After noting the parents' volitionalist desire not to be coerced into violating their religious beliefs, the Court continued:

> Nor is the impact of the compulsory-attendance law confined to grave interference with important Amish religious tenets from a subjective point of view. It carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent. As the record shows, compulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining the Amish community and religious practice as they exist today . . . .[460]

The *Yoder* Court recognized two different types of interference with free exercise: subjective and objective. Subjective interference consisted of coercion of the consciences of those individuals threatened with prosecution. Objective interference consisted of the threatened loss of the Amish religious community and way of life. The Native Americans in *Lyng* asserted—and the Court accepted their assertion—that they faced the same kind of objective danger to their religious way of life, a danger independent of the subjective coercion of individual choice, will, or conscience.[461] This objective danger is the essence of a nonvolitionalist claim.[462] Thus, contrary to the assertion of the majorities in *Smith* and *Lyng*, the *Yoder* opinion offers at least some precedential support for a requirement that nonvolitionalist practices receive the same protection as volitionalist ones.

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460 *Yoder*, 406 U.S. at 218.

461 *See Lyng*, 485 U.S. at 447-53. Note that one of the claims made in Wilson v. Block, 708 F.2d 735 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983), is strikingly similar to the interpretation of *Yoder* suggested above. The Hopi claimed that the presence of a ski resort on the sacred mountains would make it impossible to convince their children that those mountains were truly sacred. *Id.* at 740 n.2. This is remarkably close to the Amish claim that high school education will make their children less likely to accept the Amish way of life. In both cases, the threat to the religion's continued existence comes from government action that makes the religious training of the next generation more difficult. This threat does not involve the coercion of anyone's conscience.

462 Even the restrictive aspects of the *Yoder* opinion suggest a nonvolitionalist reading of the second claim: the Court sensed that it was recognizing a new category of claims and, understandably, attempted to restrict it. For example, the Court carefully emphasized the religious nature and foundation of the Amish way of life and contrasted it with secular lifestyles. *See Yoder*, 406 U.S. at 235 ("It cannot be overemphasized that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some 'progressive' or more enlightened process for rearing children for modern life."). In addition, the *Yoder* Court noted that the training the Amish wished to provide in place of high school apparently encouraged Amish children to be productive and law-abiding citizens. *See id.* at 222-26. The Court, therefore, found that exempting the Amish from the compulsory education law would pose little threat to state policies underlying the law. *See id.* at 235-36.

B. Neutrality

The case law and commentary have also discerned broad policy objectives in free exercise clause jurisprudence that support equal treatment of nonvolitionalist practices. Preservation of government neutrality toward, and avoidance of official discrimination between, religions is one recurring concern in religion clause cases. The Court has frequently repeated the famous words of *Everson v. Board of Education*: "Neither [a state nor the federal government] can pass laws which aid one religion, aid all religions, or prefer one religion over another."[463]

Although this concern over neutrality is most apparent in establishment clause cases,[464] the Court has also referred to discrimination as a violation of the free exercise clause.[465] For example, in *Larson v. Valente* the Court asserted that, "[f]ree exercise . . . can be guaranteed only when legislators—and voters—are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations."[466] Government preference for one religion[467] places pressure on the dissenter to conform to the prescribed orthodoxy and thereby violates her individual freedom of religion, her free exercise.[468]

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463 Everson v. Board of Educ., 330 U.S. 1, 15, *reh'g denied*, 330 U.S. 855 (1947); *see* School Dist. v. Schempp, 374 U.S. 203, 216 (1963); Torcaso v. Watkins, 367 U.S. 488 (1961).

464 *See, e.g.*, Engel v. Vitale, 370 U.S. 421, 436 (1962); *Torcaso*, 367 U.S. at 495; McGowan v. Maryland, 366 U.S. 420 (1961); *Everson*, 330 U.S. at 15.

465 *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 406 (1963) ("unconstitutionality . . . compounded by . . . religious discrimination"); *Schempp*, 374 U.S. at 222 (discussing neutrality as both an establishment clause and a free exercise clause principle); Braunfeld v. Brown, 366 U.S. 599, 607, *reh'g denied*, 368 U.S. 869 (1961) ("if the purpose or effect . . . is to discriminate invidiously between religions, that law is constitutionally invalid"); *Torcaso*, 367 U.S. at 492-93 (citing *Everson*, 330 U.S. at 15-16).

466 456 U.S. 228, 245, *reh'g denied*, 457 U.S. 111 (1982).

467 The Court has frequently affirmed that government preference for all religions is also a violation of the required neutrality. *See* Grand Rapids School Dist. v. Ball, 473 U.S. 373, 381 (1985); *Schempp*, 374 U.S. at 216; *Everson*, 330 U.S. at 15. This position is hotly disputed in the literature on the religion clauses. *See, e.g.*, WALTER BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY (1976); ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982); L. LEVY, *supra* note 382, at 91-119; Edward S. Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROBS. 3, 20 (1949); Robert G. McCloskey, *Principles, Powers, and Values: The Establishment Clause and the Supreme Court*, in 1964 RELIGION AND THE PUBLIC ORDER 3-33 (Donald Gianella ed. 1965). We do not discuss this controversial issue because it is sufficient for our purposes to rely upon the general agreement that, at a minimum, governmental discrimination between religions violates the neutrality prescribed by the religion clauses.

468 *See Engel*, 370 U.S. at 430-31. Neutrality is also justified by the desire to avoid the political strife that would attend any effort to enlist governmental aid on behalf of particular religious groups. *See* Lemon v. Kurtzman, 403 U.S. 602, 622-24, *reh'g denied*, 404 U.S. 876 (1971); *Engel*, 370 U.S. at 425-27; *cf.* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) ("If [public education] is to impose any ideological disci-

Neutrality requires that the free exercise clause protect nonvolitionalist believers to the same extent that it protects those who hold volitionalist religious beliefs. The Court's recent interpretations of the free exercise clause have, however, evolved from outright discrimination against nonvolitionalist religious beliefs to a subtler, but equally dangerous, abandonment of them to the mercies of legislatures. This section will assess this treatment in light of the policy of governmental neutrality toward religions.

Prior to *Smith*, the Supreme Court increasingly had offered protection to religious believers making volitionalist claims. The Court had adopted a view of the neutrality requirement that allowed free exercise claimants to challenge facially neutral laws on the ground that the governmental action restricted their religious practice. The Supreme Court's neutrality was, in other words, an accommodationist version that took into account the impact of government regulation, and not merely its facial neutrality. "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."[469] Indeed, only a few years ago the Court reaffirmed its position in *Sherbert* that "the governmental obligation of neutrality in the face of religious differences"[470] may require granting exemptions to persons who, because of their religious beliefs, are differentially harmed by facially neutral regulations.[471]

The Court had, of course, utilized this discriminatory impact analysis only on volitionalist claims.[472] The nonvolitionalist claims

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pline, however, each party or denomination must seek to control, or failing that, to weaken the influence of the educational system."). This concern is addressed primarily by the establishment clause rather than the free exercise clause. Since the fear of sectarian strife plays no role in the Court's explanation of why the free exercise clause requires neutrality, that concern will not be discussed in this section.

469 *Yoder*, 406 U.S. at 220; *see also Braunfeld*, 366 U.S. at 607 ("If the purpose *or effect* of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid . . . .") (emphasis added). The Court has, in other words, rejected the strict neutrality espoused by Professor Kurland, which requires the government to avoid all religious classifications but allows it to act for any valid, secular purpose regardless of the effect on some or all religions. *See* Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 6, 7 (1961). At least one Justice explicitly described the Court's practice as a rejection of the Kurland approach. *See* McDaniel v. Paty, 435 U.S. 618, 638-39 (1978) (Brennan, J., concurring).

470 *Sherbert*, 374 U.S. at 409.

471 *See* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144 (1987). Several influential commentators have endorsed versions of this type of neutrality. *See, e.g.*, L. TRIBE, *supra* note 209, § 14-7; Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 518 (1968); Wilber G. Katz, *Freedom of Religion and State Neutrality*, 20 U. CHI. L. REV. 426, 428 (1953).

472 As discussed earlier, *see supra* text accompanying notes 430-62, *Yoder* is a possible exception.

in *Bowen* and *Lyng*, however, also followed this discriminatory impact format. In those cases, a facially neutral regulation created a special religious burden on certain individuals who did not share the majority faith. The nonvolitionalist element of the claim—that the negative religious effect did not result from any choice of the individual claimants—did not alter the basic discriminatory impact structure of the claim. In both volitionalist and nonvolitionalist cases, an apparently neutral regulation placed a burden on a religious minority and thereby threatened to cause the religious discrimination that the free exercise clause was designed to prevent.

The policy of neutrality between religions therefore required that the Court recognize these discriminatory impact claims in cases involving nonvolitionalist religious beliefs. The *Bowen* and *Lyng* opinions, however, denied protection from facially neutral laws to nonvolitionalist claims while allowing such protection to continue for volitionalist claims. As a result of this refusal, primarily volitionalist religions received constitutional protection from both facially discriminatory and facially neutral regulations, while nonvolitionalist religious beliefs and practices received protection only from facially discriminatory regulations.[473] Such patent discrimination between different kinds of religions constituted a straightforward violation of the Court's responsibility to remain neutral.[474]

After struggling to define the category of excluded claims for several years, the Court finally eliminated this outright discrimination in *Smith*. The Court achieved this result, however, not by raising the level of protection for nonvolitionalist claims to that already enjoyed by volitionalist ones, but by according all claims, volitionalist as well as nonvolitionalist, the minimal protection afforded by a rule that subjects government action to strict scrutiny only when it facially regulates religion. The Court acknowledged that the gov-

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473 Those nonvolitionalist practices that appear, from the courts' perspective, to fit the volitionalist model will receive the same protection as genuinely volitionalist claims. For example, one who requests an exception from the military draft will appear, from the court's point of view, to be making a claim about the coercion of his own choice even if, within his own religious framework, the harm arises nonvolitionally. But plainly nonvolitionalist claims will not be protected from the discriminatory impact of facially neutral laws.

474 Even the *Lyng* majority acknowledged that discrimination between religious beliefs would be unacceptable. *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 453 (1988) ("The Constitution does not permit government to discriminate against religions that treat particular physical sites as sacred . . . ."). The majority simply failed to recognize that its own position led to precisely this result.

Note that an individualist interpretation of the *Bowen* and *Lyng* opinions would not cure this lack of neutrality. Although an individualist interpretation would protect a larger number of beliefs—since volitionalism, as we have defined it, is a subset of individualism—it would still fail to fully protect some religious beliefs from the impact of facially neutral laws.

ernment could provide additional protection should it choose to—in the form of religious exemptions from facially neutral laws—but maintained that the Constitution does not require such accommodation. A majority of the Court has, in effect, reversed twenty-five years of precedent and established a new, weaker level of protection that appears to apply to both volitionalist and nonvolitionalist claims.

Unfortunately, the Court has never clearly defined the prohibition against facial or intentional discrimination. And now that the Court has rejected the *Sherbert* impact-based analysis, it becomes more important clearly to elaborate the protection against discriminatory laws left to religious practice. Legislatures, too, will have to confront the meaning of neutrality, not only in the normal lawmaking process but also in efforts to construct the religious exemptions authorized by *Smith*. The process of resolving the ambiguity of this concept does, however, hold serious danger of further discrimination against nonvolitionalist religions.

What does neutrality mean? Plainly, neutrality means that the government cannot discriminate between different religious sects by name, as in a law that would explicitly exclude Seventh Day Adventists from unemployment benefits. Nor can the government pass a law intended to benefit a particular sect, even if it does not name the sect. *Larson* indicates that neutrality goes at least one step further, to prohibit laws that discriminate between religions based on some characteristic of their organizations. The law struck down in *Larson*, for example, provided an exemption from charitable reporting requirements only to religions that received more than fifty percent of their funds from members. The Court found this to be a distinction between

> "well-established churches" that have "achieved strong but not total financial support from their members," on the one hand, and "churches which are new and lacking in a constituency, or which, as a matter of policy, may favor public solicitation over general reliance on financial support from memhers," on the other hand.[475]

At least two ambiguities remain, however. First, the Court has suggested that statutory distinctions between various individual beliefs—as opposed to organizational characteristics—will not qualify as discrimination between religions. For example, in *Larson*, the Court distinguished *Gillette v. United States*[476] by arguing that the Selective Service law at issue restricted conscientious objector status to

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[475] Larson v. Valente, 456 U.S. 228, 247 n.23 (1982), (quoting the decision of the court of appeals in Valente v. Larson, 637 F.2d 562, 566 (8th Cir. 1981)).

[476] 401 U.S. 437 (1971).

those who held a certain religious belief—objection to all wars rather than just to the war at hand—but did not restrict the status to those affiliated with any particular sect or denomination.[477] This distinction is, however, too absurd to be taken seriously. Surely the Court would find that a law discriminated between religions—despite the fact that it concerned only individual belief rather than group identification—if the law restricted a government benefit to those who had accepted Jesus Christ as their savior. Obviously, some beliefs are so closely associated with particular religions or sects that discrimination on the basis of those beliefs is equivalent to discrimination on the basis of religious group identity.

Of course, not all religious beliefs are so closely identified with particular sects. Indeed, the belief at issue in *Gillette*—that one should refrain from participation in some but not necessarily all wars—is an interesting and close case.[478] The focus on a law's facial neutrality will require the Court to address the thorny problem of defining which beliefs are closely enough identified with particular religious groups to qualify as a facially discriminatory basis for a law and which are not.

Already a controversial and unenviable task, this process of belief identification is also ripe with danger for smaller and less well-understood religions. Such religions are more likely to hold beliefs not readily recognizable to courts attempting to assess the neutrality of legislation. The courts will, therefore, more likely see classifications based on those beliefs as not sufficiently tied to sectarian affiliation to qualify as discriminatory. For example, a conscientious objector law that exempts only those who believe they would suffer in an afterlife for the choice to participate in war would exclude all believers with nonvolitionalist objections to war. A court might easily fail to see that this law classifies religions into categories in the same way as the law in *Larson*, because the court might not recognize the belief in volitionalism as particular to only some religions. While not all uncommon religions are nonvolitionalist, all nonvolitionalist religions in twentieth-century America are uncommon. The potential for discrimination is, therefore, substantial.

The second, related ambiguity concerns laws that extend special treatment to those who engage in a practice or activity in which not all religions participate. All religions that engage in the relevant

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477 *See Larson*, 456 U.S. at 247 n.23.

478 The distinction between just and unjust wars is part of the Roman Catholic faith, and one of the plaintiffs in *Gillette* explicitly based his claim on Catholicism. *See Gillette*, 401 U.S. at 440-41. People outside of the Catholic tradition often share this belief, however. Gillette, for example, identified himself as a humanist who held this position. *See id.* at 439.

activity receive the benefit, so there is no *Larson*-type discrimination between religions. The potential discrimination arises because religions that do not engage in the relevant activity receive no analogous benefit. For example, if a state passed a law exempting alcohol use in a religious ceremony from laws prohibiting the consumption of alcoholic beverages, all religions that use this sacrament would benefit. But religions whose sacraments take another form, perhaps ingesting peyote, or those with no sacraments at all, would not receive a comparable benefit. Similarly, when the government exempts Sabbatarians from Sunday closing laws, it helps those religions to keep their Sabbaths sacred, but gives no comparable help to those religions that revere the sacredness of land rather than of a particular day of the week. Does such facial singling out of an activity shared by only some religions qualify as non-neutral?

Although the Court has not addressed this issue directly, it has indicated that it does not regard such laws as non-neutral. For example, in *Hernandez v. Commissioner*,[479] the Court dismissed such a neutrality argument in a single paragraph. The taxpayers in *Hernandez* had challenged a provision of the Internal Revenue Code that allows deductions for gifts or contributions to religious organizations, but not for payments to the organization for services. The taxpayers claimed that the law created a denominational preference by "according disproportionately harsh tax status to those religions that raise funds by imposing fixed costs for participation in certain religious practices."[480] The Court responded that the law "does not differentiate among sects," but "appl[ies] instead to all religious entities."[481] Plainly, however, religious organizations with certain practices are singled out by this rule for benefits that organizations without those practices will not enjoy. Similarly, in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*,[482] the Court declined to apply the *Larson* test to the exemption for religious organizations from Title VII's ban on religious discrimination in employment, on the grounds that the exemption afforded a uniform benefit to all religions rather than discriminating among religions.[483] The exemption, however, benefits only religions that rely on employees, and not religions that rely on other regulated resources. But the Court apparently found the law neutral because it treated all sects engaged in the particular activity—employment—the same.

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479 490 U.S. 680 (1989).

480 *Id.* at 695.

481 *Id.* at 695-96.

482 483 U.S. 327 (1987).

483 *See id.* at 339.

Once again, this limit on the meaning of neutrality, if firmly maintained, could lead to absurd results. For example, a state legislature could provide exemptions from all facially secular laws affecting large religious groups—*e.g.*, Sunday closing laws, restrictions on alcohol, laws restricting the refusal of medical treatment—and no exemptions from laws affecting smaller religions—*e.g.*, drug laws concerning peyote, laws mandating the use of social security numbers in programs administering government benefits, laws regulating the use of sacred sites on federal land. The cumulative effect of such activity-specific exemptions would vastly privilege certain groups over others.

This discrimination would, however, be invisible as long as the Court insisted on examining each exemption individually. Each such law on its face makes no distinction between religions, offering an exemption (for the religious use of alcohol, for example) to all alike. Only if the overall condition of each group is examined does the aggregate effect of such exemptions become visible. This invisibility poses substantial danger to minority religions. A democratic legislature is, of course, most likely to accommodate the practices shared by a large number of people. Smaller or unpopular religions are likely to be systematically ignored, and thereby disadvantaged. Moreover, nonvolitionalist practices, which are both unpopular and difficult for most people to understand, are least likely to command the sympathy of legislators. Review of government action activity-by-activity would leave such religions with little or no protection from discrimination.

The Court is, however, understandably reluctant to undertake the general comparison of the legal treatment of various religious groups that would be necessary to expose this type of discrimination. It is, after all, difficult to know what the basis for such a comparison could be. Indeed, an attempt to define some common coin in which the aggregate legal treatment of a religion could be measured would very likely involve the imposition of concepts derived from majority religions on minority ones. For example, if the Court measured hardship by the number or importance of the religious rules a law forced members to break, then the harm to nonvolitionalist belief systems would again become largely invisible. Hardship could, of course, be measured by the degree of harm actually suffered by the religion, in terms of loss of membership or loss of fervor. Such an approach would, however, represent a return to a *Sherbert*-style impact analysis, but with the added disadvantage of having to measure and cumulate the harms rather than simply recognize whether any such harm has occurred.

To summarize, then, the Court began by blatantly discriminat-

ing against nonvolitionalist claims in terms of the level of protection provided by the free exercise clause. When the Court rectified this discrimination, it did so by relegating all free exercise claims to a lower level of protection tied to facial neutrality of the laws. Neutrality, however, contains unresolved ambiguities that create serious risk of further discrimination against minority religions, particularly nonvolitionalist religions, at the hands of both courts and legislatures. In order to avoid systematic discrimination against nonvolitionalist religions, courts and legislatures must either tread carefully through the maze of "facially neutral" laws, or return to a more accommodationist, impact-based analysis of neutrality.

C. Voluntarism

The other free exercise policy that supports protection of nonvolitionalist beliefs is the promotion of voluntarism. Voluntarism describes a state of affairs in which individuals freely adopt their religious beliefs and practices, without any governmental interference or influence. Although both voluntarism and volitionalism emphasize the importance of free choice in the formation of religious belief and the practice of religion, the two principles employ the phrase "free choice" quite differently. The free exercise policy of voluntarism neither implies nor requires a volitionalist theory of religion. Voluntarism ensures choices that are "free" only in the sense that they are free from government coercion, rather than entirely uncoerced or undetermined.[484] As a result, nonvolitional religions are, in the Court's sense, free or voluntary and their equal treatment will promote the policy of voluntarism.

The Supreme Court has regularly affirmed that one of the primary purposes of the free exercise clause is to assure that people are free to choose their religious beliefs and identities for themselves.[485] The religion clauses assume, according to the Court, that religious belief should be "the product of free and voluntary choice

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484 *Cf.* Garvey, *supra* note 379, at 790-91 (rejecting autonomy as the central free exercise value because the Constitution is concerned not with how citizens arrive at their choices, but rather how free from government interference citizens are to execute them).

485 *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925); Reynolds v. United States, 98 U.S. 145, 162 (1878), *overruled on other grounds*, Thomas v. Review Bd., 450 U.S. 707 (1981); *see also* Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 674 (1980); *cf.* Gail Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805, 815 (1978) (suggesting that the Court should recognize "that the central value underlying both the establishment and free exercise provisions is the protection of individual choice *in matters of religion*") (emphasis in original).

by the faithful."[486] Voluntarism posits that individuals should adopt their religious beliefs through a process of free choice based on the "zeal of [the religion's] adherents and the appeal of its dogma."[487]

This dictum defining the free exercise policy of voluntarism is somewhat ambiguous. The Court seems to use "voluntary" synonymously with "free," yet never specifies the kinds of pressures or influences from which religious belief and practice must be free in order to qualify as voluntary. We might imagine a spectrum of such influences, stretching from complete causal determinism to outright physical coercion to persuasion, and involving actors as diverse as the government, private secular institutions, religious organizations, and even families and friends. The Court is apparently assuming, without explaining, that some portion of this spectrum of influences interferes with the constitutionally mandated policy of voluntarism. In order to know what the policy of voluutarism means, we must attempt to make this assumption explicit by asking: Free from what?

The most plausible interpretation posits that "voluntary" means free from government—government coercion, government interference, government influence. The level of interference proscribed may remain problematic,[488] but the governmental identity of the interferor is essential. If voluntarism is understood in this way, then the free exercise clause should free all religious beliefs and practices from interference by the government, thus assuring that religion is voluntary.[489] This interpretation of voluntarism would require the recognition of nonvolitionalist religions and practices. Legislative or judicial discrimination in favor of volitionalist religions—by extending special protection only to such religions—will inevitably interfere with the choice of beliefs and practices and thus reduce its voluntariness.[490]

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486 Wallace v. Jaffree, 472 U.S. 38, 53 (1985); *see also* McDaniel v. Paty, 435 U.S. 618, 640 (1978) (Brennan, J., concurring) ("Fundamental to the conception of religious liberty protected by the Religion Clauses is the idea that religious beliefs are a matter of voluntary choice by individuals and their associations . . . .").

487 Zorach v. Clauson, 343 U.S. 306, 313 (1952).

488 For example, as the preceding discussion of neutrality suggests, the free exercise clause may prohibit only interference directly targeting religious practice, or it may prohibit also those actions causing an indirect impact on religion. Alternatively, the Constitution may allow persuasion through cultural messages—such as public displays of crèches—while disallowing more coercive methods of persuasion. *Cf.* Lynch v. Donnelly, 465 U.S. 668 (upholding municipality's display of crèche as part of Christmas display in public park against establishment clause challenge), *reh'g denied*, 466 U.S. 994 (1984).

489 *Cf.* Merel, *supra* note 485, at 810-11 (goal of both religion clauses is to protect free choice, but both operate only against government interference in such choice).

490 Again, an interpretation of *Bowen* and *Lyng* as rejecting only nonindividualist claims rather than nonvolitionalist ones would fare no better in terms of the policy of voluntarism. Nonindividualist beliefs may also have been formed voluntarily and the refusal to recognize them wonld itself be a type of government interference with volun-

There is, however, an alternative interpretation of the policy of voluntarism. "Voluntary" might mean free from all determinism or coercion, that is, based on a pure act of free will by the individual believer. This interpretation would be consistent with a volitionalist view of religion, in which the act of free choice is the essential religious or moral activity. The goal of the free exercise clause, under this interpretation of voluntarism, would be to increase the voluntariness of religion by freeing religious beliefs and practices from all coercion and determinism, governmental or not.

This volitionalist interpretation of voluntarism would support the Court's refusal to extend equal treatment to nonvolitionalist religions. If the goal of the free exercise clause is to promote undetermined choice in religious matters, then claims that involve no interference with undetermined choice—nonvolitional claims—would pose no threat to free exercise. The first, more modest meaning of voluntarism is, however, the better interpretation of the case law for several reasons.

First, the broad context in which the issue arises—interpretation of the first amendment—suggests that government influence is the only type of interference prohibited by voluntarism. The first amendment is explicitly addressed to the government[491] and has been interpreted by courts as placing restrictions only on governmental actions.[492] This limited scope is more consistent with the goal of voluntarism when voluntarism is understood as freedom from *government* coercion.

Second, a close examination of the particular contexts in which the Court has mentioned voluntarism demonstrates that "voluntary" refers to freedom only from government influence. For example, the famous phrase from *Zorach v. Clauson* reads, in pertinent part: "We sponsor an attitude on the part of *government* that . . . lets each [religious group] flourish according to the zeal of its adherents and the appeal of its dogma."[493] Similarly, after asserting that religious beliefs are a matter of "voluntary choice by individuals and their associations," Justice Brennan, in his concurrence in *McDaniel v. Paty*, concludes: "Accordingly, religious ideas . . . may be the subject of debate . . . . *Government* may not interfere with efforts to proselyte or worship in public places. It may not tax the dissemination of religious ideas. It may not seek to shield its citizens from those

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tary religious affiliation. Discrimination on the basis of either individualism or volitionalism would hinder rather than further the goal of keeping religion free of government interference.

491 *See* U.S. CONST. amend. I ("*Congress* shall make no law") (emphasis added).

492 *See, e.g.*, Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); Civil Rights Cases, 109 U.S. 3 (1883).

493 Zorach v. Clauson, 343 U.S. 306, 313 (1952) (emphasis added).

who would solicit them with their religious beliefs."[494] Conjoining the concept of voluntariness with restrictions on government conduct clearly indicates that "voluntary" means "free from government."

Finally, the volitionalist interpretation of voluntarism is not merely less plausible than the interpretation offered above, it is deeply problematic in its own right. If voluntary were understood to mean "free from all determinism, a product of pure choice," then the policy of voluntarism would contradict the policy of neutrality. By offering constitutional protection only to those religious beliefs or practices that flow from undetermined choices (or by attempting to enforce such choice on those whose religions direct them to create family and community structures that might inhibit undetermined religious choices),[495] voluntarism would require courts and legislatures to distinguish and discriminate against religious beliefs and practices that ascribe religious effects on the individual to something other than undetermined choice. As long as the courts recognize nonvolitionalist beliefs and practices as sincerely religious[496]—which they have so far done[497]—they cannot deny those religions the protection of the free exercise clause without violating the mandate of neutrality. The policy of voluntarism should not be interpreted to require such a violation.

The most reasonable interpretation of this dicta, therefore, posits that the free exercise clause protects individual religious belief against influence by the *government*. Free and voluntarily chosen belief is simply belief free from government interference. Beliefs that are a product of some nongovernmental influence other than the individual's choice are nonetheless to be considered free and voluntary. This definition of voluntarism neither requires nor implies volitionalism. Volitionalism is a moral theory: it describes the kind of activity (*i.e.*, choice) that generates moral consequences and may serve as the foundation for moral responsibility. Voluntarism, as the Court has used it, is a political theory: it describes the ideal

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494 McDaniel v. Paty, 435 U.S. 618, 640 (1978) (Brennan, J., concurring) (citations omitted) (emphasis added).

495 *See* Wisconsin v. Yoder, 406 U.S. 205, 242 (1972) (Douglas, J., dissenting) (arguing that the children's religious freedom was diminished by parental and community control that shielded them from exposure to alternate lifestyles).

496 This section will also consider whether the Court's definition of religion could be interpreted to exclude nonvolitionalist religions. *See infra* text accompanying notes 498-528. For purposes of this argument, however, we assume that courts will continue to recoguize such beliefs and practices as religious.

497 *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 447 (1988); Bowen v. Roy, 476 U.S. 693, 695 (1986); Wilson v. Block, 708 F.2d 735, 740 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983); Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).

relationship (*i.e.*, none) between individual religious belief and government influence. Voluntarism does not require that the religious belief be volitional, only that it be free from government coercion. Their common language of "choice" disguises the very different purposes and foci of the two theories.

D. The Definition of Religion

The arguments based on neutrality and voluntarism are, of course, persuasive only if nonvolitionalist religions are in fact religions for constitutional purposes. Neutrality is required only between various types of religions, not between religion and other sorts of belief systems.[498] Similarly, voluntarism protects religion from government interference, but provides no protection for other types of beliefs or practices.[499] The Court has, however, indicated in two ways that nonvolitionalist belief systems are religions within the meaning of the first amendment. First, the Supreme Court in *Bowen* and *Lyng*[500] explicitly acknowledged the religious nature of the beliefs at issue. Second, the Court's few statements on the definition of religion do not justify the exclusion of nonvolitionalist claims from the protection extended to constitutionally recoguized religions.

The Supreme Court in *Bowen* and *Lyng* did not question the religious character of the beliefs at issue. In *Bowen*, the Court stated the issue as "whether the Free Exercise Clause of the First Amendment compels the government to accommodate a *religiously based* objection to the statutory requirements that a Social Security number be provided by an applicant seeking to receive certain welfare benefits."[501]

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498 *See Yoder*, 406 U.S. at 215-16; *cf.* United States v. Seeger, 380 U.S. 163, 165 (1965) (interpreting conscientious objector statute to protect religious, but not political or philosophical, beliefs).

499 In other words, there is no establishment clause in the free speech clause of the first amendment: the government is generally free to attempt to influence and inculcate a broad range of ideas as long as they are not religious.

500 Almost all federal circuit courts considering nonvolitionalist claims have found them to be religious. The only exception is the *Sequoyah* case, in which the court found the beliefs at issue to be cultural rather than religious. *See* Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159, 1164-65 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980). The court admitted that "[t]he Cherokees have a religion within the meaning of the Constitution . . . ," *id.* at 1163, but found that the particular claims at issue concerned "damage to tribal and family folklore and traditions, more than particular religious observances." *Id.* at 1164. The court continued: "Though cultural history and tradition are vitally important to any group of people, these are not interests protected by the Free Exercise Clause of the First Amendment." *Id.* at 1165. It may indeed have been the nonvolitional character of the claims that caused this court to find them cultural rather than religious. If that is the case, then this court alone succumbed to cultural myopia in its definition of religion.

501 *Bowen*, 476 U.S. at 695 (emphasis added).

In other words the Court, like the government,[502] did not doubt the religious nature of Mr. Roy's beliefs. Similarly, the *Lyng* Court noted that "[i]t is undisputed that the Indian respondents' beliefs are sincere and that the Government's proposed actions will have severe adverse effects on the practice of their *religion*."[503]

These statements, which are directly on point, should foreclose any claim that the case law supports excluding nonvolitionalist beliefs from the constitutional definition of religion. Nonetheless, we will consider the Supreme Court's few general statements on the definition of religion to suggest why, as a matter of principle, the precedent is correct. Although the Supreme Court has never directly addressed the question of the definition of religion for *constitutional* purposes,[504] its comments in other contexts are relevant to the constitutional question. The issue has come up primarily in the context of statutory interpretation—most notably interpretation of the conscientious objector provisions of the federal draft law, which exempt from military duty those with religious objections to war.[505] In several of the conscientious objector cases, the Court was asked to interpret the phrase "religious training and belief," in light of its statutory definition as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code."[506]

Although the majorities in the two most important cases—*United States v. Seeger*[507] and *Welsh v. United States*[508]—based their decisions on interpretation of the statutory language and congressional intent,[509] concurrences in both cases pointed out the constitutional significance of the decisions.[510] Even if Congress has the power to refuse an exemption to all religious objectors—*i.e.*, if

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502 *See* Transcript and Brief for Government, Bowen v. Roy, 476 U.S. 693 (1986).

503 *Lyng*, 485 U.S. at 447 (emphasis added).

504 The Court has addressed sincerity of belief in free exercise cases, *see, e.g.*, United States v. Ballard, 322 U.S. 78 (1944), *rev'd*, 329 U.S. 187 (1946), but its comments on religiousity have been dicta at best. *See, e.g.*, Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961) (observing that religion does not necessarily include belief in the existence of God); United States v. Ballard, 322 U.S. 78, 86 (1944) ("freedom of religious belief . . . embraces the right to maintain theories of life and of death and of the hereafter"); Davis v. Beason, 133 U.S. 333, 342 (1890) ("The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.").

505 Selective Service Act of 1948, Pub. L. No. 80-759, § 6, 62 Stat. 604, 613.

506 *Id.*

507 380 U.S. 163 (1965).

508 398 U.S. 333 (1970).

509 *See Seeger*, 380 U.S. at 165; *Welsh*, 398 U.S. at 342-44.

510 *See Seeger*, 380 U.S. at 188 (Douglas, J., concurring); *Welsh*, 398 U.S. at 354 (Harlan, J., concurring).

there is no free exercise right to such an exemption[511]—it is not free to discriminate between religions by giving an exemption to some believers and not others. Such discrimination would create both free exercise and establishment clause problems.[512] Thus, the category of religious believers for the purposes of the statutory exemption must be the same as the category of religious believers for the purposes of the free exercise clause, unless the government has a compelling state interest to justify any omissions.[513]

The Court in *Seeger* defined "religious training and belief" as "[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption."[514] This definition appears to point to the function of the belief rather than its content.[515] It asks not whether the claimant believes in certain propositions—*e.g.*, there is a God; there is only one God—but whether her belief fulfills a certain role in her life. In order to determine whether nonvolitionalist beliefs qualify under this definition, we must specify the nature of that role.

The statutory language suggests one function that religious belief might serve: "involving *duties* superior to those arising from any human relation."[516] The common notion of duty is, of course, volitionalist: a duty is a rule of behavior one must choose to follow in order to avoid punishment or blame.[517] Assuming, therefore, that "duty" is understood in this volitionalist sense, nonvolitionalist beliefs would not appear to qualify as "religious" within the meaning

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511 The Court has not explicitly decided this question, but it has suggested that the free exercise clause requires no such exemption. *See* Gillette v. United States, 401 U.S. 437, 461 n.23 (1971); Hamilton v. Regents, 293 U.S. 245, 264 (1934).

512 *See Welsh*, 398 U.S. at 356 (Harlan, J., concurring); *Seeger*, 380 U.S. at 188 (Douglas, J., concurring); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753, 760 (1984).

513 *See* Kent Greenawalt, *All or Nothing at All: The Defeat of Selective Conscientious Objection*, 1971 S. CT. REV. 31, 39 (it is generally accepted that the *Seeger* test has constitutional overtones); Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1064 (1978).

514 *Seeger*, 380 U.S. at 176.

515 *See* Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 589; Marc Galanter, *Religious Freedoms in the United States: A Turning Point?* 1966 WIS. L. REV. 217, 264. Several commentators have pursued this functional approach. *See, e.g.*, J. Morris Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 340-44 (1969); Gail Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805, 830-32 (1978); Note, *supra* note 513, at 1075-76.

516 Selective Service Act of 1948, Pub. L. No. 80-759, § 6, 62 Stat. 604, 613 (emphasis added).

517 Duty is not necessarily volitionalist. It is possible to conceive of a duty that one is obliged to fulfill regardless of one's ability to fulfill it by volition, so that a lack of free will could not excuse its violation. *See supra* text accompanying notes 322-70. Nonetheless, duty is commonly understood in the volitionalist sense.

of the statute because they would not impose such duties on the faithful.[518] There are at least two reasons why this statutory language does not support a restrictive constitutional definition of religion which would include only volitionalist beliefs.

First, the statute tells us little about the constitutional function of religion that the Court had in mind. The functional approach adopted by the Court is, in fact, in tension with the language of the statute, which seems to specify certain substantive beliefs—*e.g.*, in a Supreme Being[519]—as the criteria for religiosity. Indeed, the Court's inattention to the statutory phrase concerning duty in *Seeger* and *Welsh* confirms the suspicion that the statutory reference to "duty" does not describe the function that the Court intended.[520]

Second, the function of generating duties plainly does not exhaust the role of religion as envisioned by the Court in *Seeger*. The majority opinion in that case provides direct evidence that the Court had a broader function in mind, one that would include nonvolitionalist beliefs as well as volitionalist ones. In explaining why it reached its broad interpretation of the statutory requirement of belief in a Supreme Being, the Court quoted from theologians who described religious belief not in terms of duty but in terms of ultimate faith,[521] answers to questions about the meaning of life and death,[522] and conceptions of the highest ideal.[523] The Court adopted a similar notion for itself when it wrote that within this statutory phrase "would come all sincere religious beliefs which are

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518 Interestingly, one of the commentators who has explicitly advocated a functional definition framed that definition in terms of duties and obligations. *See* Merel, *supra* note 515, at 831 (Religion is a multidimensional belief system "involving duties and obligations to conform to the standards of a unified belief system that cuts across and directs more than a single aspect of an individual's life."). Merel recognized that adding any "objective," or substantive, element to the definition created a potential intrusion on religious freedom, *id.* at 829-30, and also acknowledged that her definition includes such an "objective" element: the requirement that the system address more than one aspect of life. What she fails to notice is the way in which the requirement of a framework of duties and obligations also restricts religious freedom. Indeed, Merel seems not to have considered that religion could take any other form. This omission, by one so sensitive to the need for a nondiscriminatory definition, is strong evidence of the prevalence of the volitionalist viewpoint.

519 The Act was amended, after *Seeger* and before *Welsh*, to remove the reference to a Supreme Being. It continued to require, however, that "essentially political, sociological, or philosophical views, or a merely personal moral code" would not qualify as religious belief for the purposes of assigning conscientious objector status. Military Selective Service Act of 1967, Pub. L. No. 90-40, 81 Stat. 100, 104.

520 The *Welsh* opinion even disregarded the part of this phrase that Welsh himself explicitly rejected—"superior to those arising from any human relation." Welsh v. United States, 398 U.S. 333, 343 (1970).

521 United States v. Seeger, 380 U.S. 163, 180 (1965) (citing Paul Tillich, a Protestant theologian).

522 *Id.* at 181-82 (citing a Catholic Ecumenical Council draft declaration).

523 *Id.* at 182-83 (citing David Muzzey, a leader in the Ethical Culture Movement).

based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent."[524] Obviously, such beliefs do far more than simply generate moral duties; they serve as the foundation for a whole religious vision.[525]

Nonvolitionalist beliefs may form the foundation of faith in the sense described by the Court. Such beliefs often involve answers to questions about the meaning of life and death, and the origin and purpose of the world and of humankind.[526] Nonvolitionalist beliefs may also include a conception of the highest ideals which human beings can attain or desire.[527] And, of course, nonvolitionalist beliefs may form the ultimate faith on which all other beliefs and actions depend.[528] Such beliefs should, therefore, qualify as religions within the meaning of the first amendment and receive the protection of the free exercise clause.

E. Conclusion

When we examine briefly the nature of religious beliefs, it becomes clear why the free exercise clause must protect nonvolitional beliefs. Whatever else religion may involve, it usually includes some claim about the nature of reality.[529] That reality may include the existence and significance of God,[530] of some holy text,[531] or of some sacred institution.[532] It may include reincarnation,[533] or the

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524 *Id.* at 176. The opinion interprets the phrase "belief in a Supreme Being" rather than interpreting the requirement that the belief be religious per se. Nonetheless, a belief that would qualify as "belief in a Supreme Being" would also qualify as religious. The Court held that if a belief meets the test laid down in this case then it could not be found also to be political, sociological, philosophical or a "merely personal moral code." *Id.* at 186.

525 *See* Greenawalt, *supra* note 513, at 39 (interpreting the *Seeger* test as relying on the thought of Paul Tillich).

526 *See* M. ELIADE, *supra* note 66; AKE HULTKRANTZ, THE RELIGIONS OF THE AMERICAN INDIANS 29-32, 129-39 (1967).

527 *See* A. MACINTYRE, *supra* note 79, at 148 (discussing Aristotle's account of the virtues as dependent on a notion of the human telos).

528 *See* Benjamin Lee Whorf, *An American Indian Model of the Universe*, in TEACHINGS FROM THE AMERICAN EARTH: INDIAN RELIGION AND PHILOSOPHY 121-29 (Dennis Tedlock & Barbara Tedlock eds. 1975).

529 This is by no means intended as a sufficient definition: there might be many systems of thought that would meet this qualification and yet not be religions. Nor is it intended as a necessary component of all religions. The point is simply that this is an essential element of many religions.

530 *See* L. JACOBS, *supra* note 40, at 33 (the first principle is the existence of God).

531 *See* W. CLARKE, *supra* note 46, at 22-47 (describing the role and authority of scripture in Christian theology).

532 *See* H. SMITH, *supra* note 75, at 333-37 (discussing the authoritative teaching and sacramental roles of the Catholic church); Hendricks, *supra* note 53, at 40-41 (the Catholic church is the sole path to complete salvation).

533 *See* H. SMITH, *supra* note 75, at 75-80 (discussing the Hindu belief in reincarnation and karma).

illusory nature of the material world,[534] or a harmonious balance between competing yet complementary forces.[535] Religion often, if not always, proffers some vision of the nature of an ultimate reality and the role of human life within it.

Religious reality may include an afterlife, with rewards and punishments meted out in accordance with volitionalist principles of personal responsibility. If it does, then it will be consistent with our culture's secular, and also volitionalist picture of reality. We understand why Sherbert believes she will be punished for violating her Sabbath even though we may not agree that working on Saturday is against God's law. Even if we disagree with her about the particular religious rule at issue, most of us share her view of reality in which only certain kinds of causal connections—most notably those based on human free choice—can generate moral consequences.

But the free exercise clause does not guarantee merely the freedom to differ about particular religious rules, such as whether Saturday or Sunday is the required day of rest. It guarantees the much greater freedom to disagree about whether religious reality consists of such rules at all or of something else entirely. It guarantees the right to hold a religious picture of reality completely inconsistent with the majority's secular, volitionalist picture, and it protects that right from government discrimination.

This special protection for alternative religious visions, which is at the heart of the free exercise clause, distinguishes that clause from much, perhaps all, of the rest of the Constitution. Even those parts of the Constitution that are not explicitly volitionalist generally allow courts and legislatures to give preference to the common social vision—which is volitionalist—and impose it on dissenters. It may be the realization that the Constitution does contain a particular vision of reality that has led some scholars to argue that the religion clauses are not completely neutral as between world-views, but must, on the contrary, be based upon some substantive philosophy.[536] Although the Constitution generally may reject claims based on visions inconsistent with its own, the free exercise clause

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534 *See id.* at 82-86 (discussing the Hindu conception of the world as "maya": illusion).

535 *Id.* at 211-13 (discussing yin and yang in Taoism).

536 *See, e.g.*, Mansfield, *supra* note 381, at 856-58. Mansfield maintains that "[t]he Constitution embodies a particular view of human nature, human destiny and the meaning of life." *Id.* at 856. For example, cruel and unusual punishment is wrong, majority vote is a good way to resolve disputes. *Id.* at 856-57. On the other hand, Mansfield himself concedes that the constitutional philosophy celebrates freedom. As a corollary, the Constitution requires that the state tolerate religious ideologies consistent with the constitutional ideology and even that it tolerate, to some unspecified extent, religious ideologies inconsistent with the constitutional philosophy. *See id.* at 857-58. Indeed, "[g]reater freedom may be required for religious than for nonreligious ideologies incon-

cannot.[537] It is not possible to preserve freedom of religion without providing equal protection for those religious views of reality that clash with the social norm.[538]

Nonvolitionalist beliefs are not just strange, failed versions of volitionalist ones; they are the result of a different religious vision. To refuse to grant them equal treatment is to deny constitutional protection to a whole range of religions simply on the ground that they are inconsistent with the majority's view of reality. But one of the primary purposes of the free exercise clause was to protect the rights of persons who hold religious visions different from those of the majority. For this reason, the free exercise principles of neutrality and voluntarism, and the definition of religion, require even-handed treatment of nonvolitionalist and volitionalist religions.

SECTION SEVEN. DOCTRINAL JUSTIFICATIONS FOR REFUSING EQUAL TREATMENT TO NONVOLITIONALIST PRACTICES

A. Introduction

Thus far, this Article has developed the distinction between volitionalist and nonvolitionalist practices and argued that the Constitution generally requires equal treatment of the two. In some instances, however, the legislature may discriminate in favor of volitionalist practices—by extending them special protection while denying protection to analogous nonvolitionalist practices. First, the government under *Larson* might have a compelling state interest in protecting some practices but not others, because of the different degrees of disruption to the government's activities by the protection required for different practices. Thus, the legislature could exempt a Roman Catholic from laws against liquor consumption on Sunday but deny accommodation to one who sincerely believes that he will suffer eternal torment if the United States maintains a standing army. Second, certain demands for special treatment may raise

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sistent with the constitutional philosophy." *Id.* at 858. Thus, Mansfield may actually agree with our argument.

537 Of course, by its very assertion that the Constitution must tolerate different religious views of reality, even the free exercise clause may be said to embrace only a particular range of metaphysical views; it necessarily denies those views that would restrict, by the mechanism of the state, the availability of divergent views. Similarly, the establishment clause, to the extent that it has any metaphysical rationale, is consistent with only a limited range of metaphysical positions; it necessarily denies those beliefs that seek to establish themselves. *See* Galanter, *supra* note 515, at 289-90; Note, *Reinterpreting the Religion Clauses: Constitutional Construction and Conceptions of the Self*, 97 HARV. L. REV. 1468, 1481 n.67 (1984).

538 *See* Garvey, *supra* note 379, at 798 (arguing that religion is much like insanity because, in part, it can lead one to "understand[] natural events in a way wholly at odds with the rest of society").

serious establishment clause concerns because at some point accommodation becomes impermissible support of religion. Under the *Sherbert* regime, an otherwise valid free exercise practice claim is not invalid simply because the required remedy appears to raise establishment clause difficulties.[539] After *Smith*, however, the free exercise clause does not generally require legislative accommodation of religious practice; so such accommodation should be subject to normal establishment clause analysis.

Legislatures may deny protection to some nonvolitionalist practices while extending it to volitionalist practices, because protecting the former requires more severe disruption than protecting the latter. This difference is inherent in the nature of the underlying belief. Volitionalist religions recognize only religious effects that are the product of an individual's own free choices. From the volitionalist perspective, government action has no religious effects unless it constrains individual choices. Thus, a volitionalist practice will seek relief from only one type of government action: restrictions on an individual's choice to act in certain ways.[540] Such a choice-based practice will also request only limited accommodation: exemption for the claimant from the relevant restrictions. Once the individual is exempted, his choice is no longer coerced and he will, therefore, no longer suffer a religious effect.

To nonvolitionalist religions, however, anything the government does might create hardship for a believer. Nonvolitionalist religions might find religious significance in any government activity, from adopting a particular filing cabinet to declaring war. The religious effect of these government actions might, in turn, lead to limits on an individual's religious practice within the "frame of reference" of the believer. Thus, a nonvolitionalist believer might seek legislative relief from government behavior, even if that behavior does not, according to *Lyng*, coerce or penalize the choice of any individual. Protecting a nonvolitionalist practice, moreover, might require any kind of accommodation, from special treatment for the individual believer to a complete reordering of the government's affairs. Exempting the individual claimant will often fail to protect a nonvolitionalist practice.[541]

Thus, claims for legislative accommodation fall along a contin-

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539 *See* Sherbert v. Verner, 374 U.S. 398, 409-10 (1963); Wallace v. Jaffree, 472 U.S. 38, 83 (1985); L. TRIBE, *supra* note 209, § 14-4; Kurland, *supra* note 469, at 15.

540 This Article deals with practice rather than belief claims.

541 Not all nonvolitionalist claims are of this more extreme type. Mr. Roy's claim, for example, does not ask the government to cease using social security numbers for all beneficiaries; it asks only for an exemption for Mr. Roy's family. The point is simply that nonvolitionalist claims have the potential to take this more far-reaching form, while volitionalist claims will always be satisfied by an exemption.

uum defined by the type of protection required. At one end lie what we will call "exemption" claims: the remedy for which consists primarily of providing specialized treatment for the individual claimant and those who share his religious beliefs. Exemption claims generally create only individualized administrative inconvenience. At the other end of the continuum lie what we will call "ordering" claims: the remedy for which consists primarily of reordering some aspect of the government's program not limited in application to the individual claimant. So, for example, the only sufficient remedy for Navajos who object to the flooding of Rainbow Bridge Canyon would be for the government to lower the water level in Lake Powell. This action would have serious consequences for all those dependent on the reservoir for their water supply. There is no way to satisfy the Navajo claim through special exemptions for the Navajo alone because the harmful religious effect does not arise from any government action specifically regulating the Navajo's individual conduct or otherwise individually concerned with them.

The crucial difference between these two types of claims is that ordering claims have a much greater potential for interfering with government programs and policies than do exemption claims. An ordering claim, by definition, requires a remedy not limited in application to the individual claimant. It is therefore likely to alter the impact of the government program on a greater number of persons than would an exemption claim. In addition, ordering claims may directly challenge a particular policy choice, rather than simply objecting to its application to certain people. The government might find itself unable to satisfy the claimant while pursuing the given policy through other means. In short, ordering claims are, as a practical matter, likely to impose greater burdens on the government than will exemption claims.[542]

Nonvolitionalist claims pose a greater challenge to the government than volitionalist claims because nonvolitionalist claims can take the form of either ordering or exemption claims, while volitionalist free exercise claims will always be exemption claims. *Lyng* pro-

542 The distinction between exemption claims and ordering claims is one of degree rather than of kind, which is why we have described it as a continuum. Contrary to the Court's suggestion, exemption claims like Sherbert's require changes in the internal administration of the program no less than claims like Roy's. Indeed, because the number of persons who share Sherbert's beliefs is likely to be much greater than the number who share Roy's, the internal changes necessary to accomodate her claim are likely to be larger and more expensive. In addition, many exemption claims, like ordering claims, involve effects on persons other than the claimant, if only by raising the tax burden for a given program. The distinction is, nonetheless, useful because it indicates the importance of certain differences of degree in determining when a nonvolitionalist claim goes too far. *Cf.* Lupu, *supra* note 5, at 964 (noting the existence of different types of claims but without identifying or examining them in detail).

vides an example of a nonvolitionalist ordering claim: To satisfy the Yuroks, the government would have to alter its use of a resource that affects many people other than the claimants. *Bowen v. Roy*, on the other hand, involved a nonvolitionalist exemption claim. Roy did not need the government to cease using social security numbers for all beneficiaries but only for his own family. His claim was nonvolitionalist because the special treatment did not consist of an exemption from government regulation *of his own conduct*, but the requested remedy was nonetheless an exemption for a particular case.[543]

The Court in *Bowen* and *Lyng* may well have sensed that judicial recoguition of nonvolitionalist free exercise claims involving facially neutral laws might implicate a vast range of government actions and require very intrusive relief.[544] The Court first chose to address these fears by retreating to an unprincipled, and we helieve unconstitutional, distinction between volitionalist and nonvolitionalist claims in *Bowen* and *Lyng*. Because only nonvolitionalist claims can be ordering claims, the Court's position eliminated the threat posed by the recognition of *Sherbert*-style nonvolitionalist claims. It achieved this result, however, at the cost of sacrificing all of the relatively harmless nonvolitionalist exemption claims.

Having found that distinction difficult to maintain, the Court in *Smith* took the other obvious tack and retreated, not from the recognition of nonvolitionalist claims, but from *Sherbert*'s requirement of impact neutrality. By adopting a strict neutrality position, and rejecting impact-based claims against facially neutral laws, the Court reduced the danger of most ordering claims. This solution came, of course, at the expense of all exemption claims, volitionalist as well as nonvolitionalist. In addition, it suffers from all the often noted pitfalls of the strict neutrality approach.[545]

The Court's retreat reduced but did not eliminate the need to consider the disruptive potential of nonvolitionalist claims. Under the new *Smith* approach, legislatures hold the primary power to protect religions from facially neutral laws by providing religious exemptions and modifications. As the Court itself recoguized, leaving

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543 Roy also made a less controversial claim which did concern his own behavior in providing the social security number. *See supra* text accompanying notes 126-29.

544 The Court's reference to claims about the color of the government's filing cabinets in Bowen v. Roy, 476 U.S. 693, 700 (1986), and to a "broad range of government activities—from social welfare programs to foreign aid to conservation projects" in Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439, 452 (1988), make it clear that it was precisely this possibility of ordering claims directed against facially neutral government policies that frigbtened the Court.

545 *See, e.g.*, Greenawalt, *supra* note 512, at 811; Galanter, *supra* note 515, at 289-93; Merel, *supra* note 515, at 808.

this protection to legislatures is likely to result in greater solicitude for the needs of majority religions and less for the needs of minority ones. Legislatures may be less willing to accommodate nonvolitionalist claims because they are not only less familiar than volitionalist ones, but also potentially more intrusive. But, as the previous sections on history, policy, and precedent indicate, the Constitution requires that all government actions, including these gracious gestures of legislative accommodation, treat volitionalist and nonvolitionalist religions evenhandedly.

As a result of *Smith*, courts are likely to face a new wave of free exercise claims in which believers complain that the state is discriminatorily providing accommodation for other religions but not for theirs. What counts as discrimination will, of course, depend on how courts resolve the ambiguities concerning "facial neutrality" discussed in the previous section.[546] Assuming, however, that legislatures are violating whatever emerges as the meaning of neutrality, they would have to meet the strict scrutiny standard in order to justify discrimination between religions.

We need not protect ourselves from the dangers of extreme ordering claims by excluding all nonchoice-based religions from protection. It is not the nonvolitionalist element of such religions that threatens us, but the far reaching accommodation required for their satisfaction. It is possible to recognize and protect nonvolitionalist religious beliefs and practices generally while rejecting only those that pose this special danger.[547] The focus, then, should not be on some attempt to categorize claims as volitionalist or nonvolitionalist, or even as ordering claims or exemption claims. Courts and legislatures should, instead, carefully assess the particular impact of accommodating each religious practice to determine whether it poses a serious, realistic threat to the functioning of the government. Since this impact justifies rejecting a plea for religious freedom, an assessment of this impact, and not some imprecise or irrelevant label, should be the basis for the decision.

B. The Balancing Process

The Supreme Court usually applies a strict scrutiny balancing test to claims that the state has discriminated between religions: the government must show that its action is the least restrictive means

546 *See supra* text accompanying notes 475-83.

547 *Cf.* Goldman v. Weinberger, 475 U.S. 503, 530-31 (1986) (O'Connor, J., dissenting) (arguing that the special needs of the military can be accounted for in the traditional balancing test; no special deference should exclude free exercise claims against the military at the threshold).

of serving a compelling state interest.[548] Only if the state can meet this stringent test can it defeat the claimant's prima facie case. Notice that it is the *discrimination* that the state must justify. Because the state could eliminate this discrimination in either of two ways, there are two parts to the proof it must offer to justify it.

First, the state could eliminate the discrimination by denying protection to all religions. It must, therefore, show that it has a compelling interest in providing protection to volitionalist religions. Although the *Smith* opinion has now held that such accommodation is not constitutionally required, nothing in *Smith* or in free exercise jurisprudence casts doubt on the government's strong interest in accommodating religion.[549] We will assume, therefore, that such accommodation is, at least much of the time,[550] a sufficiently important state interest to satisfy the strict scrutiny standard.[551]

Second, the state could also eliminate the discrimination by protecting nonvolitionalist religions along with volitionalist ones. In order to justify its choice to discriminate, the state must therefore also show that it has a compelling interest in excluding nonvolitionalist religions from protection. Here, it becomes relevant that nonvolitionalist claims can pose such a severe threat to the functioning of government. Unless the strict scrutiny standard can take account of this threat, it will leave legislatures with the Hobson's choice of protecting no one or enduring severe disruption of gov-

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548 Larson v. Valente, 456 U.S. 228, 246, *reh'g denied*, 457 U.S. 111 (1982); *see* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 450-51 (1988); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); Sherbert v. Verner, 374 U.S. 398, 406 (1963); L. TRIBE, *supra* note 209, § 14-13; Note, *Of Interests, Fundamental and Compelling: The Emerging Constitutional Balance*, 57 B.U.L. REV. 462, 463-64 (1977).

549 Certain types of accommodation are, of course, prohibited by the establishment clause, but the Court has long held that there is an area of discretion between what the free exercise clause requires and what the establishment clause prohibits. In this area the state may legitimately choose to accommodate religious believers. *See, e.g.*, Gillette v. United States, 401 U.S. 437, 453-54, 461 n.23, *reh'g denied*, 402 U.S. 934 (1971).

550 It might be possible for the burden on religion to be de minimis, in which case there should not be a compelling state interest in accommodation. It would also be possible for the courts to undertake a type of "centrality" assessment and find a compelling interest in accommodation only where the burden of a neutral law falls on a "central" or "indispensible" religious practice. The Supreme Court has thus far refused to take the latter path.

551 The proposed accommodation would also have to be narrowly tailored to serve this interest in protecting the volitionalist believers. This requirement will be met in most cases. Because such accommodations generally derogate from the underlying policy served by the law being modified, the government can usually be counted on to draft the accommodations fairly narrowly.

For an interesting, and probably rare, instance in which Indians benefitted from legislative discrimination, see Peyote Way Church of God, Inc. v. Thornburgh, 59 U.S.L.W. 2503, No. 88-7039 (5th Cir. Feb. 6, 1991) (upholding an exemption given exclusively to the Native American Church from federal and state laws banning peyote use).

ernmental functions. There are, however, doctrinal tools available for halting the progression along the continuum from exemption claims to the more dangerous ordering claims. At some point, the government interest in denying protection to an ordering claim becomes compelling, even if it extends protection to a less intrusive claim.

To help legislatures locate this point, courts could more clearly define what makes a state interest compelling. In particular, courts could be more specific in describing different types of government interests and the weight attached to them. This specificity would enable both courts and legislatures to distinguish between accommodations that pose a serious threat to government operations and those that do not, and more confidently to identify the compelling state interest in refusing accommodation of some ordering claims. Dangerous claims could then be refused without undermining protection for other types of claims.[552]

The first step in weighing the government's interest is to recognize that the government bears the burden of proof on the importance of its interest. The Court cannot simply assume that the government will suffer harm if it is required to accommodate volitionalist and nonvolitionalist practices equally. The state must demonstrate that such a harm will occur and must provide as much evidence as possible of the specific nature and extent of that harm. "[W]hatever the substantive content of the 'compelling interest' test, procedurally it appears to mean that the state must particularize and support with evidence claims that its interests subordinate those of free exercise of religion."[553] The second step is to recognize that the government interest at issue is not the interest in the general law or policy that restricts religious practice, but only the interest in avoiding whatever changes would be necessary to accommodate nonvolitionalist believers along with volitionalist ones. This is a simple application of the "least restrictive means" principle: if the government can serve its overall purpose in a way that is less restrictive of religion, then the only interest it has at stake is the marginal interest in pursuing its chosen path rather than the less

552 A more flexible and sensitive analysis of what makes a government interest compelling is not a new idea. Several commentators have suggested doctrinal modifications that might increase the sensitivity of that analysis in the context of *Sherbert*-style claims. This section relies heavily on their work. *See generally* Clark, *supra* note 515; Galanter, *supra* note 515, at 217; Donald Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part I. The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381 (1967); Greenawalt, *supra* note 512, at 770-71; Pepper, *supra* note 109.

553 Pepper, *supra* note 109, at 340; *see* Employment Div., Dep't of Human Servs. v. Smith, 485 U.S. 660, 672 (1988) (Brennan, J., dissenting).

restrictive alternative.[554] The government interest must, therefore, be measured at the margin.[555]

The location of the request for accommodation along the continuum from exemption claims to ordering claims will be significant in determining where that margin lies. The marginal change demanded by an exemption claim is merely that the government widen the scope of the special protection accorded some religious groups to include the petitioner and others with similar religious beliefs. The marginal accommodation required by ordering claims, on the other hand, can implicate a substantial variety of government interests, since the requested changes can involve anything from minuscule administrative details to abandonment of the whole program. It is reasonable to assume that ordering claims, as an empirical matter, will tend to cause a greater disruption of governmental activities than exemption claims.[556]

Once a court has identified the boundaries of the government's marginal interests, it should next evaluate the nature and importance of the particular harms posed by the claim. These harms fall into several categories that can be roughly ranked in order of ascending importance. Both ordering and exemption claims may result in the kinds of harms identified in each category, but ordering claims will usually cause a greater degree of interference.

1. *Cost and Administrative Inconvenience*

The change in government practice necessary to accommodate a religious objection will almost always involve some additional cost or inconvenience to the government. If the government has already accommodated some believers, and the claimant alleges that the accommodation has been granted discriminatorily, the question will be whether the cost and inconvenience provide a compelling reason for distingnishing between those accommodated and those excluded. If the claimant requests only that he and those like him be exempted from a law, the government's interest in refusing him is limited to the additional cost of processing those exemptions and of giving benefits to claimants who would otherwise be ineligible. If

554 *See* Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 B.Y.U. L. REV. 299, 311.

555 *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 106 (1980); Clark, *supra* note 515, at 331; Galanter, *supra* note 515, at 280; Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464, 467-68 (1969).

556 The intrusiveness of the remedies requested in several of the sacred land cases seems to confirm this assumption. *See, e.g.*, Badoni v. Higginson, 638 F.2d 172, 176 (10th Cir. 1980); Crow v. Gullet, 541 F. Supp. 785, 788 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir. 1983). Even if this assumption were not supported by the evidence, we would adopt it in order to recognize the legitimate fears that are motivating the courts.

the claimant requests the government to reorder the program in order to eliminate the discrimination, the real impact may still fall only on cost or administrative convenience. For example, assume that the government allows welfare applicants to refuse to supply their social security numbers if their religion prohibits them from doing so. This accommodation exempts certain religious objectors from a general legal obligation to use the numbers. Assume further that Roy believes that the government's use of a social security number to identify *anyone* will destroy his daughter's spiritual powers. He might ask the government to extend its accommodation to include his beliefs by devising a different identification system for all recipients, not just certain members of his own family. This would be an ordering claim, but the only significant impact of acceding to the request would be to increase the cost and perhaps the inconvenience of the identification program.

In cases where the government can accommodate the claimant with only an increase in cost or inconvenience, the balance is strongly in favor of the claimant. The Supreme Court has insisted that cost and inconvenience alone are not sufficiently compelling to meet the strict scrutiny standard.[557] There is, in other words, no point at which cost in an absolute sense—a certain quantity of money—constitutes a sufficient government interest to justify discriminating between religions. The government has no compelling interest in simply having any particular amount of money.

Cost does, nonetheless, play a role in the courts' assessment of the government's interest. The "least restrictive means" branch of strict scrutiny requires that the government show that there is no alternative method that it could employ in furthering the objectives of its program that would provide more equal treatment for the claimant's religion. This requirement must, however, be qualified to some extent by the cost of the alternative. There is often a less restrictive means available, but it may entail great expense.[558] At some point, the expense becomes so large that accommodation is not a realistic alternative. In particular, the cost of accommodating the claimant could become so high that the government would be justified in abandoning either the underlying program at issue, or the general process of accommodation. For example, in the above

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557 *See* L. TRIBE, *supra* note 209, § 14-13 n.40.

558 *Cf.* Clark, *supra* note 515, at 331 (cost may be in loss of efficiency); John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1485 (1975) ("a more perfect fit involves some added cost"); Galanter, *supra* note 515, at 281 (state may have a compelling interest in avoidance of expense and administrative inconvenience); Note, *Developments in the Law: Equal Protection*, 82 HARV. L. REV. 1065, 1102 (1969) (any alternative classification must be administratively feasible).

hypothetical, if it became too expensive to identify welfare recipients through some means that would satisfy Roy's objections, the government might decide not to accommodate anyone, or it might abandon the welfare program altogether. The state will have a compelling interest in avoiding those costs if: first, the high costs of accommodation make it reasonable to discontinue the general accommodation or the underlying program;[559] second, (as we are assuming),[560] the state has a compelling interest in accommodating religious believers; *and* third, the program itself serves a compelling state interest. Note that it is the interest in certain policies or programs that is compelling, rather than the interest in money, but as a practical matter the two are related.

Obviously, the cost of accommodating an exemption claim will depend, to some extent, on the number of people who share the claimant's religious beliefs. The cost of providing the exemption increases as the number of potential claimants increases.[561] The same is generally not true of ordering claims: the cost of changing a particular policy or program is usually independent of the number of people who share the claimant's religious objections to that policy. The result is that, for exemption claims, the government's interest becomes stronger as the number of people whose religious beliefs are offended grows. This seemingly paradoxical result is softened by two considerations. First, as a rough generalization, if a large number of persons share a particular religion, they have a greater ability to use the political process to ensure their inclusion in any accommodation. Hence, they have less need for the constitutional protection against religious discrimination.[562] Second, economies of scale may reduce the impact of increasing numbers of claimants on the government's costs. Thus, an increase in the number of potential exemption claimants may add little or no weight to the government's interest.

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559 It is the cost of accommodation in proportion to the total cost of the program that would determine the reasonableness of continuation. Accommodation costs would have to rise to a substantial portion of the total costs to justify abandonment of the program. *See* Pepper, *supra* note 554, at 335. In addition, such costs may have to exceed some absolute minimum. If a program is very inexpensive, then even a doubling of its cost might not be sufficient if the total is still quite low. The question of reasonableness is, of course, one for the Court and not merely for the government. The government cannot be allowed to "blackmail" the Court into sacrificing a claimant's free exercise rights by threatening to terminate an essential government progam if it is forced to pay the costs of accommodation.

560 *See supra* text accompanying notes 550-51.

561 *See* Clark, *supra* note 515, at 332.

562 *See* J. ELY, *supra* note 555, at 78; Galanter, *supra* note 515, at 291; Pepper, *supra* note 554, at 313-14.

2. *Interference with Substantive Government Policy, but Without Concrete Impact on Particular Third Persons*

A somewhat more serious government interest is at stake when the change necessary to accommodate a religious claimant will require some sacrifice of the government's substantive policy goals. Ordering claims may often entail such a change in policy. For example, assume that Congress passes a law ordering that the National Endowment for the Arts not fund art that offends the religious sensibilities of a majority of Americans. A claimant could assert that the government is discriminating against religions that find other government-funded activities religiously offensive. The claimant might ask, for example, for the cancellation of the NASA space program on the grounds that exploration of space is disrespectful of the gods and will cause them to punish humanity—including the claimant—by depriving all persons of healing powers. The only way the government could accommodate this claim would be to abandon the space program, but that would sacrifice the policy objectives that the program serves (for example, improvements in technology and expansion of scientific knowledge). On the other hand, such policy-related losses are not unfairly concentrated upon specific third parties; rather they are general social burdens borne by all members of society.

Exemption claims may also endanger substantive policy goals. When the policy behind the government activity is to create a certain result in every case—*i.e.*, to prevent nonmedical drug use by all persons—then every additional exemption detracts somewhat from the achievement of that policy. The size of such a loss in effectiveness varies with the number of exemptions, but in most cases involving religious exemptions it would seem to be relatively small.[563]

Exemptions may create a more severe interference with substantive policy when uniformity is essential to the overall implementation of a policy.[564] For example, a court could reasonably refuse

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563 *See* Bowen v. Roy, 476 U.S. 693 (1986) (O'Connor, J., concurring); Quaring v. Peterson, 728 F.2d 1121, 1127 (8th Cir. 1984), *aff'd sub nom.* Jenson v. Quaring, 472 U.S. 478 (1985) (per curiam); People v. Woody, 61 Cal. 2d 716, 723, 394 P.2d 813, 819, 40 Cal. Rptr. 69, 75 (1964).

564 The case of Goldman v. Weinberger, 475 U.S. 503 (1986), in which the Supreme Court upheld disciplinary action against an orthodox Jewish officer who violated Air Force regulations by wearing his yarmulke while on duty and indoors, is *not* an example of this use of the policy of uniformity. The Air Force justified its regulations by referring to the need for uniform dress. It distinguished between visible signs of religious affiliation, which it refused to accommodate, and invisible signs, which it did accommodate. The majority in *Goldman*, however, did not assess the need for uniformity and did not consider whether visible signs interfered with that need more than invisible ones. Instead, the Court simply deferred to the judgment of the military that such a need existed and would be threatened by an exemption in this case. *See id.* at 509 ("The desirability

to allow exemptions from the tax laws because exemptions pose a special threat to the substantive policy of providing funds for the government in a manner that is both effective and fair.[565] The need for uniformity in taxation arises because of strong incentives for fraudulent exemption claims; everyone can be expected to want to escape paying taxes.[566] This uniformity argument will, however, generally be foreclosed to government when facing a claim of religious discrimination. If the government has chosen voluntarily to relinquish uniformity in the name of accommodating some religions, it should not be permitted to offer the need for uniformity as a reason for refusing to accommodate others.[567]

3. *Impact on Concrete Interests of Identifiable Persons*

Greater weight falls on the government's side of the balance when the accommodation the claimant requests is distinguished from permissible accommodations on the ground that it would interfere with a particular third party's interests. Exemptions from the criminal laws often create this type of interference. For example, the government could provide exemptions, for ceremonial religious use, to laws prohibiting the ingestion of peyote. If it did, then a claimant might allege discrimination unless the government exempted him from laws that prohibit a religious rite involving the handling of poisonous snakes in the presence of third parties.[568] Religious exemptions to a health or building code could also threaten the safety of persons who live or work in the vicinity.

Ordering claims may also have a detrimental effect on the inter-

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of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment."); *id.* at 515 (Brennan, J., dissenting) (The Court "adopts for review of military decisions affecting First Amendment rights a subrational-basis standard—absolute, uncritical 'deference to the professional judgment of military authorities.' "). The decision in that case rests, therefore, on deference to the military and not on any independent judgment about the policy of uniformity.

565 *See* United States v. Lee, 455 U.S. 252, 258-60 (1982); Giannella, *supra* note 552, at 1409. *But cf.* Walz v. Tax Comm'n, 397 U.S. 664 (1970) (upholding the constitutionality of property tax exemptions for churches against an establishment clause challenge).

566 *See* Pepper, *supra* note 554, at 327; *cf.* Choper, *supra* note 485, at 698-99 (arguing that draft avoidance could become an incentive for religious conversion).

567 This principle applies uuless the refused accommodation implicates a uniformity concern absent from the allowed accommodation. Under the new approach in *Smith*, and in the absence of deference to the military, this would have been the question in *Goldman*—whether the Air Force had a compelling need for uniformity that justified providing an exemption for invisible religious clothing but refusing to allow visible religious clothing. *See supra* note 564 (discussing the *Goldman* case).

568 *See, e.g.*, Swann v. Pack, 527 S.W.2d 99 (Tenn. 1975). There is an important distinction between third parties who are members of the religion and knowingly consent to the risk imposed upon them, and third parties who are uninformed or outsiders. *See* Clark, *supra* note 515, at 361; Galanter, *supra* note 515, at 282-83.

ests of third parties. For example, the government might seek to protect historically significant churches by maintaining them with public monies. The Navajo might then argue that this special protection must be extended to their places of worship to avoid discrimination. To accommodate that request, the government would be required to lower the water level of Lake Powell reservoir so as to reverse the flooding of Navajo sacred sites.[569] If the government lowered the water level sufficiently to achieve this objective, however, a severe water shortage in the many cities and towns served by the reservoir would result.[570]

Practical, nonspeculative, and serious harm to the interests of identifiable third parties provides a strong reason to accept the government's argument against extending its policy of accommodation to a particular claimant. While such harm may not be as large or widespread as the damage to substantive policies discussed in the second category, it contains an element of unfairness that adds to its urgency. When accommodation of a religious claim creates a loss in substantive policy effectiveness, it requires all citizens of a particular jurisdiction to bear an incremental share of the burden.[571] This request is fair because all share in the benefits of the religious freedom that is thereby protected.[572] But when accommodation imposes a loss on identifiable third parties, a small number of persons are asked to bear the whole cost of protecting the religious freedom that all enjoy.[573] A harm to particular third parties, therefore, adds considerably to the weight of the state interest.

4. *Interference with the Constitutional Rights of Third Persons*

Perhaps the most weighty reason the government can offer for

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569 *See* Badoni v. Higginson, 638 F.2d 172, 177 (10th Cir. 1980).

570 *See id.*

571 This argument assumes that the purpose of social policy is to promote the general welfare. This is a common, but by no means uncontroversial, assumption. *See, e.g.*, Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471, 476-77 (1988). If some other model of legislation is adopted—such as interest group pluralism—the frustration of certain substantive policies might be seen as creating a loss focused on one or a few identifiable groups, rather than a loss spread more generally over the population.

572 Even those who are nonreligious, and do not receive the direct protection of the free exercise clause, share in the indirect benefit of living in a society in which others may freely practice their religions.

573 *See* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1165-66 (1967) (quoting from LEONARD TRELAWNEY HOBHOUSE, LIBERALISM 41 (1964)). This unfairness could be mitigated by government-sponsored compensation and more widespread redistribution of the burden. In some cases, however, no such redistribution is possible. For example, when a conscientious objector is exempted from the draft, some other particular person, who would not otherwise have been drafted, must serve.

refusing to accommodate a particular religious practice is that such accommodation will interfere with the exercise of a constitutional right by a third party. This problem arises most clearly in ordering claims that require the government to impose a religious observance on persons other than the claimants. For example, a group might argue that if the government seeks to accommodate religious beliefs in its rnnning of public schools by releasing children during the school day for religious observances, then the government must also accommodate their beliefs by imposing mandatory prayer in the public schools. Such mandatory prayer would violate the free exercise rights of schoolchildren subject to it,[574] in addition to establishing religion.[575]

It is also possible, although much less likely, that accommodating an exemption claim might interfere with the constitutional rights of a third party. The difficulty in finding a constitutional violation in exemption cases is the state action requirement. An exemption simply allows a private party to practice his religion. That practice might interfere with the ability of a third party to speak, for example, but in that case the restriction on speech would normally be attributed not to state action but to the action of the private believer. The Constitution would not apply at all in the absence of state action.[576] Only if the government's grant of the exemption would be sufficient to hold the state responsible for the limits imposed on the third party could an exemption claim create this most serious kind of concern.

Bob Jones University v. United States[577] provides an example of an exemption claim where the state action requirement might be met. In that case, the Court found that the free exercise clause did not require the government to make an exception to its general tax policy by providing tax-exempt status to private schools that practiced racial discrimination, even if the school believed its religion re-

574 Although there is no case specifically on point, several related holdings indicate that mandatory prayer in the public schools would violate the free exercise clause. The Court has suggested that the establishment and free exercise clauses overlap in that both prevent the government from imposing a particular religious practice on those who disagree with the practice, while the establishment clause goes further and prevents government endorsement of religion even when all participation is voluntary. *See* School Dist. v. Schempp, 374 U.S. 203, 221, 222 (1963). Similarly, in Torcaso v. Watkins, 367 U.S. 488 (1961)—in which the Court held that a religious oath for public office was unconstitutional—the Court failed to specify which clause was violated and, indeed, cited previous cases involving both clauses. In any event, mandatory prayer (at least if it involved verbal or symbolic expression) would surely violate the free speech clause of the first amendment. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

575 *See* Engel v. Vitale, 370 U.S. 421 (1962).

576 *See* Civil Rights Cases, 109 U.S. 3 (1883).

577 461 U.S. 574 (1983).

quired racial discrimination.[578] Assume that the government provided tax-exempt status to religious organizations that violated other limits on charitable status—in other words, allowed them religious exemptions from those requirements. The refusal to exempt Bob Jones University from this requirement could then be seen as religious discrimination. Nonetheless, the government might justify that discrimination by showing that an exemption from this particular requirement would involve an intrusion on a third party's constitutional rights. Government support of such private activity through subsidization by tax exemption might create the nexus necessary to a finding of state action.[579] If the state action requirement were met, then the racially discriminatory practices of the school would violate the equal protection rights of black students.[580]

The analysis of the government's interest is, in reality, more complex and less determinate than the simple listing of categories might suggest. The government must demonstrate that it has made a good-faith effort to discover means of accommodation and that all such means fail for one or more reasons such as those above. The possible permutations of such reasons are, of course, far too numerous for the government or the courts to examine completely. As a result, the analysis can never be exhaustive.[581] In addition, the compelling state interest test requires the government to prove a negative: that there is no alternative course of action that is both less discriminatory to this claimant and not opposed by a compelling state interest. Such a proof must always be inductive—and thus not logically certain—because the issue is an empirical rather than an analytical one. The analysis is, therefore, necessarily both incomplete and uncertain.

Because the suggested list of categories only refines the compelling state interests standard, it will not eliminate the inherent uncertainty and incompleteness of that analysis. It will, however, provide greater clarity to the process of determining when a sufficient degree of completeness or certainty has been attained.

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578 *See id.* at 602-04.

579 *See* Norwood v. Harrison, 413 U.S. 455 (1973); Green v. Connally, 330 F. Supp. 1150 (D.D.C.), *aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971). The Court specifically declined to decide this issue in *Bob Jones*, relying on the power of the I.R.S. to deny such an exemption rather than on any constitutional duty for it to do so. *See Bob Jones*, 461 U.S. at 599 n.24.

580 The argument in text is not the basis for the Court's decision in *Bob Jones*. The Court in that case found that even if the school had a prima facie free exercise claim, the government's substantive policy of preventing racial discrimination in education was a compelling state interest that could not be served in any less restrictive way. *See Bob Jones*, 461 U.S. at 599 n.24.

581 *Cf.* STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE (1990) (discussing the eclectic method).

Greater precision in this process should allow courts and legislatures to feel more confident that they have considered enough of the issues, and that they have done so in a consistent enough way, to justify what is an inevitably imperfect conclusion.

C. Establishment Clause Problems

The strict scrutiny standard adequately addresses the government's interest in extending discriminatory accommodation to different religious groups, but it ignores the policies under-lying a related constitutional mandate: the establishment clause. The *Smith* Court invited at least some special accommodation of religion by the legislature. Such accommodation, however, always presents potential conflicts with establishment clause doctrine requiring that government action have neither the purpose nor the primary effect of advancing religion, and that it avoid excessive entanglement.[582] Establishment clause case law distingnishes between allowed and forbidden accommodation, but the line between the two has never been clear and shows no signs of improvement.[583]

In its most elaborate recent exposition of this distinction, the Court upheld the exemption of religious organizations from Title VII's ban on religious discrimination in employment. The exemption, the Court explained, was an example of "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."[584] Addressing the requirement that all laws have a primary secular purpose, the Court held that a secular purpose need not be unrelated to religion. It is a permissible secular purpose to "alleviate significant goverumental interference with the ability of religious organizations to define and carry out their religious missions" as long as that alleviation does not become promo-

582 *See* Mueller v. Allen, 463 U.S. 388, 394 (1983); Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971); Sherbert v. Verner, 374 U.S. 398, 414 (1963) (Stewart, J., concurring). Although the Supreme Court has lately been vacillating on the importance of the *Lemon* test, *see* Lynch v. Donnelly, 465 U.S. 668, 679 (1984), there is no reason to believe that purpose and effect will no longer be relevant to the establishment clause analysis. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578 (1987) (holding state statute requiring teaching of "creation science" unconstitutional on grounds that it had no secular purpose); Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986) (upholding constitutionality of state assistance program because primary effect was not to aid religion but to help individual students).

583 *Compare* Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) (upholding an exemption for religious organizations from Title VII's prohibition against employment discrimination on the basis of religion) *with* Texas Monthly v. Bullock, 489 U.S. 1 (1989) (plurality opinion) (striking down an exemption from state sales tax for periodicals published or distributed by a religion).

584 *Amos*, 483 U.S. at 334 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 673 (1970)).

tion.[585] Similarly, on the requirement that a law have a primary secular effect the Court held: "A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence."[586] The critical question, in other words, is whether the purpose or effect of the law can better be understood as removing government-imposed obstacles to the practice of religion—which is allowed—or as throwing the weight of government support behind religion—which is not allowed.

Unfortunately, as Justice O'Connor pointed out,[587] many laws can easily be characterized in either way, depending on how the Court characterizes the *status quo ante*. Thus, the exemption from Title VII could be merely removing a government obstacle because the *status quo ante* is employer freedom from all regulation; or it could be government support because the *status quo ante* is a universal ban on discrimination in employment. As a practical matter, this unclarity is likely to disadvantage nonvolitionalist religions because the Court is likely to import its volitionalist bias into its attempts to distinguish between government support and government obstruction.

Suppose, for example, that the government yielded to Roy's demand that it not use a social security number with regard to his daughter. In language that could have been borrowed from the establishment clause standard, the *Bowen* Court described this demand as an interference with internal government activity and an insistence that the "[g]overnment *itself* . . . behave in ways that the individual believes will further his or her spiritual development."[588] The Court further denied that in the Constitution's frame of reference, the government's use of a social security number placed any burden on Roy's conduct. In other words, because of its volitionalist bias, the Court will miss the fact that many ostensibly internal government activities are obstacles to nonvolitionalist practice. As a result, it will construe accommodation of that practice as government sponsorship of, or participation in, a particular religion.[589]

Such a view of the range of permissible accommodations would

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585 *Id.* at 335.

586 *Id.* at 337 (emphasis in original).

587 *Id.* at 347 (O'Connor, J., concurring).

588 Bowen v. Roy, 476 U.S. 693, 699 (1986).

589 On the other hand, *Lyng* specifically invited Congress to grant special protection to Indian sacred sites. *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 453-54 (1988). Members of Congress have accepted the Court's invitation by introducing amendments to the American Indian Religious Freedom Act that would do exactly that. *See* S.1124, 101st Congress, 1st Sess. § 3, 135 CONG. REC. S6220 (1989).

be as discriminatory, and as unconstitutional, as *Bowen* itself. But legislative accommodation of nonvolitionalist practice might run afoul of the establishment clause for a more legitimate reason: the potentially far-reaching effects on how the government conducts its business. However the Court manages to distinguish between permissible and forbidden accommodation, it stands to reason that questions of degree will play a part. The more that nonvolitionalist practices require truly extraordinary protection—for example, draining Lake Powell—the likelier the Court is to find that protection unconstitutional. This general tendency seems quite legitimate: the establishment clause seeks to prevent the government from promoting religion; the greater the protection granted, the closer the government comes to promotion.

As a result, protecting certain nonvolitionalist practices may involve such massive disruption of government that the legislature is not only constitutionally allowed to decline protection, it is constitutionally required to do so. Furthermore, the legislature may decline such protection even if it is extending special treatment to other religious practices, because it is surely a distinction of constitutional maguitude that some accommodations are positively forbidden by the Constitution, while others are not. Establishment clause doctrine, however, like free exercise clause doctrine, is very much in a state of flux. Consequently, until the Court illuminates the murky boundary between permissible and forbidden accommodation, it is impossible to tell exactly which nonvolitionalist practices the legislature may accommodate and which it may not.

CONCLUSION

For over two decades, the Supreme Court has negotiated a precarious path between the claims of religious minorities and the needs of a bureaucratic government. Last Term, this path dramatically shifted course when the Court abandoned more than twenty-five years of protection of religious practices from facially neutral laws. The Court seems to have forgotten, or stopped caring, that in a world of vastly expanding state power and activity, if religious freedom is not protected from incidental infringement by facially neutral laws, government may gradually marginalize religion in the lives of most Americans.[590] The *Smith* case, with its disingenuous descriptions of precedent, represents the triumph of bureaucratic concerns—concerns about ease of application and orderly rule-boundedness—over the protection of religious freedom.

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590 *See* L. TRIBE, *supra* note 209, § 14-8; Galanter, *supra* note 515, at 268, 279; Giannella, *supra* note 552, at 1383.

But if *Smith* is a disaster for religion generally, it is a special calamity for nonvolitionalist religions. When viewed in the context of *Bowen* and *Lyng*, *Smith* is revealed as the latest step in a retreat from constitutional protection, a retreat motivated by fear of nonvolitionalist beliefs. The process began with the short and cryptic opinion in *Bowen*, in which the Court held that no prima facie free exercise claim existed because the government action at issue was a matter of "internal procedure[]" within the Constitution's volitionalist "frame of reference."[591] It progressed to the more developed opinion in *Lyng*, in which the Court explained that it would refuse to acknowledge any burden on religious practice where the government action neither coerces the individual into violating his religious beliefs nor penalizes him for practicing his religion.[592] The retreat culminated in *Smith*, where, giving up the effort to cast out only nonvolitionalist claims, the Court completely abandoned protection for all religious practices from facially neutral laws.[593]

The type of claim that seems to have prompted this constitutional rout is not merely some poorly phrased version or accidental mutation of a more traditional free exercise claim. These claims are the result of a religious vision of reality different from the volitionalist vision that dominates modern American culture. Moreover, this alternative vision played a significant role in the religious views of many of those involved with the drafting and passage of the first amendment. Indeed, nonvolitionalist beliefs conceive the universe to be, in a sense, more religiously charged than does the mainstream today. Because the individual's own free choices are not the only source of religious consequences, any event, object, or actor could be fraught with inherent significance—rocks, trees, canyons, floods, hurricanes, or rainbows. Even the government's actions—in building a road or using a social security number—may directly cause religious effects on nonvolitionalist believers. When the Court turns its face away from nonvolitionalist beliefs, it excludes an entire theological category of believers from the full protection of the Constitution.

And the Court has turned its face away. *Smith* restored the superficial neutrality that was destroyed by *Bowen*'s and *Lyng*'s blatant discrimination against nonvolitionalist beliefs. But *Smith* relegates all religions to the position of supplicants before the legislatures. Protection from facially neutral laws is no longer a constitutional mandate but is instead a matter of populist politics. Such an ar-

591 *See Bowen*, 476 U.S. at 700-01 & 701 n.6.

592 *See Lyng*, 485 U.S. at 439.

593 *See* Employment Div., Dep't of Human Servs. v. Smith, 110 S. Ct. 1595, 1600 (1990).

rangement is hardly neutral. It disadvantages minority religions, religions with unusual or unfamiliar beliefs, and religions whose practices may require large-scale or intrusive accommodation. Nonvolitionalist religions are all three.

The restrictions adopted by the Court in *Bowen* and *Lyng* represent the creation of a religious orthodoxy through the very constitutional mechanism intended to prevent one. The Court's position in *Smith* effectively invites legislatures to adopt their own orthodoxies. The Constitution has, of course, foreclosed that option to legislatures, but the only doctrinal mechanism that remains to enforce that constitutional prohibition is the ban on discrimination between religions. *Larson*'s mandate of neutrality is all that stands between minority religions, particularly nonvolitionalist religions, and the vicissitudes and expediencies of the political process.

Larson-style neutrality is, unfortunately, not a very stable foundation for religious freedom. Comparing the treatment of different religions to determine whether the state is behaving "neutrally" is a formidable task. If taken to its logical conclusion, it could force the Court into the impossible undertaking of determining whether the government is treating each and every religious option, on the whole, in a neutral fashion, compared to every other religious option. This analysis would require some notion of meta-neutrality, some Archimedean point of neutrality, from which to assess the impact, not just of particular government actions, but of whole schemes of government. And, of course, as the scope of government activity grows, larger and larger areas of social life would come within the scheme to be assessed. Such a sweeping analysis is theoretically impossible (because no absolute Archimedean point exists),[594] practically impossible (because of the size of the undertaking), and fundamentally undesirable as a judicial undertaking even if it were possible.

Absent such a sweeping analysis, however, it is not clear that "facial neutrality" will actually protect nonvolitionalist religions from discrimination. It is far too easy for a legislature to simply offer protection and accommodation only on those issues and in those activities of concern to majority religions. Some protection will inevitably trickle down to less popular religions, but, because nonvolitionalist beliefs are so fundamentally different, they are not likely to enjoy many crumbs from the volitionalists' table. One would think that the concern about such discrimination might incline the Court to reconsider the more protective *Sherbert* approach. The majority in *Smith*, however, failed to appreciate that if the religion clauses

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594 *See* Phillip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CALIF. L. REV. 817, 824 (1984).

mean anything, they mean that discrimination against minority religions is not simply an "unavoidable consequence of democratic government."[595]

The Court's failure to take such discrimination seriously is, above all, a failure of the sensitivity that might have led to greater awareness or imagination. It is surely no coincidence that all of the cases in which this retreat took place involved American Indians. The Court finds the Indians' religions—as it found the Mormon religion in the early free exercise cases—so aberrant as to be dispensable.[596] If the Court had been more sensitive to, or had felt more personally moved by, the loss of these religions, that experience might have awakened the imagination necessary to see that the neutrality demanded by the Constitution was violated in these cases, and will likely be violated by legislatures in the future. The Court is fond of repeating a reassuring truth: In the religious realm, the Constitution knows no orthodoxy. Like a small stone cast into the American cultural pond, religious liberty gradually created ripples, and the concentric rings of religious pluralism first reached all Protestants, then all Christians, then the "Judaeo-Christian tradition." The Court, in *Lyng* and *Bowen*, froze this ripple effect and prevented religious liberty from reaching beyond volitionalist beliefs. Then, in *Smith*, it retreated still further, putting back at risk all unpopular religions. But we are no more a volitionalist nation than we are a Protestant one, a Christian one, a Judaeo-Christian one, or a generally religious one—and we never have been. In this century, the Court at last sought to grant religious liberty to the later immigrants to this country. Yet in the last several Terms, it has refused to extend the same liberty to the earliest inhabitants. We hope that the Court will develop the courage and perspicacity to correct this error before some of the oldest religious traditions in America are irretrievably lost.

595 *Smith*, 110 S. Ct. at 1606.

596 *Cf. id.* at 1603 (quoting Reynolds v. United States, 98 U.S. 145 (1879)).